UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 15-23007-LGB

Adv. Case No. 17-08264-LGB

- x

In the Matter of:

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Debtor.

- x

THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS ON BEHALF OF THE BANKRUPTCY ESTATE OF THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC., et al.,

Plaintiffs,

v.

McKESSON CORPORATION,

Defendant.

- x

United States Bankruptcy Court

One Bowling Green

New York, NY 10004

May 18, 2022

10:15 AM

B E F O R E :

HON LISA G. BECKERMAN

U.S. BANKRUPTCY JUDGE

ECRO: KB

HEARING re 15-23007-lgb Motion for Summary Judgment on Debtors First, Fifth and Thirteenth Omnibus Claim Objections Seeking to Disallow 11 U.S.C. 503(b)(9) Claims (related document(s)2689, 2541, 2957, 2598, 2913, 2828, 2413)

HEARING re 15-23007-lgbMotion to File Under Seal Certain Exhibits to the Devito/Milin Declarations in Support of Responses to Motions for Summary Judgment

HEARING re 15-23007-lgb Motion to Strike McKesson Corporations Motion to Strike Portions of the Declaration of Dawn DeVito (related document(s)5086)

HEARING re 17-08264-lgb Motion for Summary Judgment

HEARING re 17-08264-lgb Motion to File Under Seal Certain Exhibits to the Devito/Milin Declarations in Support of Responses to Motions for Summary Judgment

HEARING re 17-08264-lgb Motion to Strike McKesson Corporations Motion to Strike Portions of the Declaration of Dawn DeVito (related document(s)127)

Transcribed by: Sonya Ledanski Hyde

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P R O C E E D I N G S

THE COURT: Okay. The next matter before me is related, obviously, to two matters on the two specific cases, one adversary proceeding and obviously also the underlying case. So the matters are case number 15-23007 The Great Atlantic and Pacific Tea Company Inc. and Adversary Proceeding No. 17-08264, the Official Committee of Unsecured Creditors of the Atlantic and Pacific Tea Company Inc, et al. v. McKesson Corporation.

So may I have appearances of counsel please?

MR. GARFINKLE: Yes, Your Honor. Jeffrey Garfinkle of Buckhalter. Also with me is Tracy Klestadt of the Klestadt Winters firm on behalf of McKesson. I'd like, just before I start, Your Honor, just kind of caution the Court. I am now on about day 15 of recovering from COVID --

THE COURT: Oh.

MR. GARFINKLE: So I still have a slight cough, but so I apologize to the Court in advance if my -- if I have to cough during my presentation.

THE COURT: Oh, no, that's fine. How are you feeling, more importantly?

MR. GARFINKLE: Your Honor, apparently I suffered the consequences of going to the ABI annual meeting where a number of people came down with COVID, I understand, so -- but I'm actually doing quite well now, but other than having

a residual cough. Thank you, Your Honor.

THE COURT: Oh, sorry to hear that. Okay. MR. Griffin?

MR. HAMERSKY: This is Mike Hamersky from Griffin Hamersky for the plaintiff and also Richard Milin from Griffin Hamersky is appearing and he will be handling the oral argument. It appears he's having a little bit of technical difficulties right now, but if he unmutes his phone, I'm sure he can appear as well.

THE COURT: Mr. Milin?

MR. MILIN: Well, I thought I was unmuted. Am I?

THE COURT: You are now. We're just making a little bit of a joke about your unmuting. Sorry.

MR. MILIN: That's okay. We're all getting used to the technology. In any event, Your Honor, I'm here. We do represent plaintiffs, which is the Creditors Committee on behalf of the estate of A&P, and we are in the process of being retained by the estate directly as well.

THE COURT: Okay. All right, so I think the matters that were before me today are first the motion to file under seal certain exhibits. Then obviously, we have the summary judgment motion and then we have the motion to strike. So I was going to suggest that I deal with the motion to seal first, since there doesn't seem to be any opposition, and then -- to file under seal.

And then I thought that we -- I would make a couple of remarks myself before we get into the summary judgment argument. My suggestion, to be honest, with respect to the motion to strike is that we just go through the summary judgment motion first. I'm not I'm not going to rule from the bench today. So, it's not something that can't be taken up afterwards if we feel that that's necessary. Obviously, there's some dispute about that.

And then before I -- and then I'm going to take things under advisement anyway, because obviously, as you all know, we get into the summary judgment motion and as some people have noted in their papers, which is correct, there are a number of certainly novel issues of law in connection with the summary judgment motion, ones where there's not a lot of case law, ones in this district where there's basically no case law, and where it's certainly, I guess timely and interesting, as I believe plaintiff noted in their papers, that this was the same topic in part that was raised in connection with the National Moot Court Competition for Duberstein this year, which I judged the semifinals on for full disclosure.

So it's not something that I'm going to be able to rule from the bench today about. For those obvious reasons, this is going to require a decision. I would possibly expect appeals in light of the cutting-edge nature of it.

So that's why I think we can get through everything and then, you know, it'll just -- I'll have to take it under advisement and rule.

So why don't we start with the motion to file under seal? Doesn't appear that there were any objections that were filed in response to that. I understand, having reviewed obviously, some of the exhibits why there's commercial information where there are concerns about that. So I didn't see any objection myself to filing those particular exhibits under seal. I don't know if anybody -- I didn't see a formal objection, but I just wanted to make sure there was no opposition to that.

MR. GARFINKLE: Your Honor, for McKesson, Jeff Garfinkle. No, we have no opposition to the motion to seal.

MR. HAMERSKY: And Your Honor, Mike --

THE COURT: Okay.

MR. HAMERSKY: -- Hamersky. There were no objections.

THE COURT: Yes. I know. We checked. So I will go ahead and grant that motion.

With respect to the summary judgment motion, so I was trying to just -- I want to deal with one matter before and then I want to sort of give you my thoughts on just the legal issues. I realize there are a lot of other issues, too, here in the summary judgment motion. So we could just

move forward with argument on that.

So the first thing is, I have reviewed the transcript from Judge Drain's hearing in September. That's obviously been the subject of dispute as to whether he had actually granted summary judgment with respect to the ability to offset the 503(b)(9) claim against any -- 503(b)(9) claim against any potential preference liability.

And I've reviewed the transcription. My reading of it, which is consistent with the argument that McKesson made in its papers, which is that the judge decided this and that this is law of the case. And while I realize that it is possible for me to reconsider, ignore the law of the case et cetera, I'm not going to do that. I think this is an issue that Judge Drain did render summary judgment on.

What I agree with the plaintiff on though is I don't think that he necessarily ruled on what the nature of the 503(b)(9) claim is. In other words, the discussion was certainly about the asserted 503(b)(9) claims where proofs of claim had been filed and the amounts are determined or asserted. I don't think that his decision specifically dealt with the issue that is one of the issues that has to be argued before me today, which is in essence, what happens if there's a preference issue, a preference recovery where there's a determination that there is a viable preference here and whether that -- what type of claim that then gives

rise to.

I don't think it's because claim is contingent myself. I don't I don't think that's the issue, that he ruled or didn't rule on that. I don't think there was a differentiation in his ruling, but I think what he did leave open is what happens if there's a -- ultimately a determination of a preference here in terms of the 503(b)(9) claim and how that gets adjusted. I don't think his decision went that far.

I do think his decision went far enough to say that whatever the 503(b)(9) claim is, that it could be set off, but not in the context of the issue I think that's been raised before me in the summary judgment motion, which is, if I -- if in fact there was a preference that was viable here and ultimately determined to exist, does that give -- and it relates to the payments that were made in connection with 503(b)(9), you know, would that give rise to a 503(b)(9) administrative expense claim or does that give rise to something else under 502.

So I think that issue is still alive, but I don't think that it's appropriate for me to revisit the setoff concept. I think Judge Drain, in fact, did rule on this and I am not going to be revisiting that. So I just wanted to be clear with that. I have read the whole transcript from that day and I understand that that's what Judge Drain

ruled. I understand why people -- why the plaintiff had issues with the ruling. There's certainly not a lot of case law on this.

There are arguments that plaintiff makes that, that are certainly interesting, but I know that Judge Drain, knowing Judge Drain, that he certainly, you know, considered that. He wouldn't have made a statement that he was granting it. His comments were clear that he didn't enter an order because he just didn't think it was worth entering an order on one matter, and that's why he didn't do it, but I don't think that the -- his decision was unclear. So I just wanted to state that for the record so we don't spend any time arguing about that.

MR. MILIN: Your Honor, if I may, a point of clarification because the issue whether setoff should be barred for equitable reasons was not in front of the judge. So in addition to the fact that he didn't rule on the potential setoff for preference liability, which was not before him, he also did not rule on equity and I just wanted to note that as well and -- because that's what we think.

THE COURT: Right. Well, I understand. I've read your papers, so I understand that. I agree. I don't think he had a trial or made a decision on the equities issue, at least not in transcripts I've read so far, which is probably not every hearing you all have had in this adversary

proceeding, for certain, I'm guessing.

That's for sure certain, but I think what he was saying is if there's an allowed 503(b)(9) claim here and certainly there has been asserted both a fixed amount 503(b)(9) claim and a 503(b)(9) claim that was filed that covers whatever the adjustments could be, and I am not calling that contingent because I don't think it's contingent in the sense that -- it is contingent, obviously, on there being a preference determination, but it's not contingent in the sense that the amounts were set forth in it and it's not liquidated.

People understand what the amount is. It wasn't filed in an unknown amount. It was filed in an amount that takes into account whatever might happen in the decision, but it covers all the possible amounts. But I agree with you that there wasn't a whole trial at least that I've seen on the merits of the equities case, which I guess would be something that could be raised at trial.

MR. MILIN: Thank you, Your Honor.

THE COURT: Okay. Okay, so my cheat sheet of issues -- that's the way I'll describe it -- I sort of look at the summary judgment arguments as breaking down into a couple of categories, some of which are -- and again, you have to remember, I -- probably good, bad, or indifferent, I'm appearing, you know, I'm coming into this case very far

into it.

And while obviously I understand the legal issues, I'm certainly not as familiar with the factual issues as Judge Drain would have been because of all the years of dealing with matters in these cases. So on the legal issues to me, it seems like the issues that we're going to be discussing today in the summary judgment motion for the legal -- what I would describe as pure legal issues are the issue of the subsequent new value and whether the fact that the amounts were paid is an issue for counting towards the subsequent new value defense, what I would describe as the interplay of 503(b)(9), 502(h) and 547. And that brings up a couple of issues.

It brings up the issue of what I guess I'll describe as the temporal issue whether or not the 503(b)(9) claims themselves, because of the nature of, I guess the administrative nature of the claims but also the timing of the payment really more of those claims, whether that means that they can't be used in the new value defense or in essence is a double counting in the context of the subsequent new value defense.

And then the issue I've already flagged, which is what happens if transfers are voided with respect to the 503(b)(9) claim asserted by McKesson and how does that interplay with 502(h) and what happens with respect to that.

There's also obviously issues about the claims allowance which I put into the bucket of -- sorry to describe it -- less legal, more issue of whether there is a factual dispute because of the fact that certainly there was -- I think everybody acknowledges that there were -- there is a claim, you know, that's allowed that doesn't have to do with the preferential recoveries necessarily, but it's just in fact owed to McKesson and then there's a dispute about what does that mean and how is that determined and what's the amount.

And the amount of the dispute seems to me from my reading the papers to have to do with whether or not the calculation has been agreed to, whether or not there's credits. There also is certainly a factual dispute in connection with the preference defense calculation with the calculation of the new value defense on a factual basis having to do with some of the issues that were already raised in our brief discussion so far, which has to do with, of course, whether or not there were other -- there should be adjustments to the new value calculation based on things other than what are actually in the invoices.

And then, of course, I guess the arguments about whether or not there was any other sorts of defenses relating to or claim -- reasons for disallowing claims relating to, my words, behavior. So that's my overview. I'm sure I've missed some things, but that's the way I

looked at the papers and in terms of the things that have to be addressed before me, and that's obviously not taking into account the motion to strike.

MR. MILIN: Your Honor --

THE COURT: So I'm sure there's things I've missed but that's what I that's the -- my cheat sheet of things that I have already gleaned out of the papers.

MR. GARFINKLE: Thank you, Your Honor. Jeff Garfinkle. Since we're the we're the moving parties, do you want us to address the Court first or how would you like to handle this?

THE COURT: Yeah. So I was going to --

MR. MILIN: The Court --

THE COURT: -- suggest. Go ahead.

MR. MILIN: Yeah. Your Honor, before we move on to the formal argument, Your Honor was just discussing identification of the issues and I wanted to make sure that your chambers saw a document that we circulated not long ago which does the same thing and in our view would be helpful to the Court and help structure the argument certainly that we intend to present.

THE COURT: You mean your demonstrative?

MR. MILIN: Yes, Your Honor.

THE COURT: Yeah, that's actually interesting because I put my list together before I saw your

demonstrative, but I'm sure it'll still be very helpful with respect --

MR. MILIN: All right.

THE COURT: And -- okay. And Mr. Garfinkle, I obviously don't have a -- you are the movant, so you would certainly go first in the argument and you're obviously free to address anything that I raised just now in my summary and anything else that you think I've missed. I have read obviously all your papers, so I would appreciate though, remember I'm starting this case again as I noted, you know, many years into it, and so I'm sure that if Judge Drain were the person on the other side of this conversation now on our virtual bench, that there are many facts that he would just already understand completely more than I would have because I've just read papers and he's obviously lived the case for years and there's no way to replace that knowledge, from my experience both in practice and on the bench.

So anyway, but with that, I will turn the virtual podium over to you.

MR. GARFINKLE: Thank you Your Honor. Again, Jeff Garfinkle for McKesson Corporation. First, let me thank the Court for its time and also apologize to the Court. Unbeknownst to me, again I was -- because I was still trying to recover from COVID in the midst of doing these reply briefs, we overlooked the Court's local rule on the length

of the reply brief. Our reply brief was 32 pages long which exceeds the local rule for that. I apologize because we did not submit a motion to allow us to exceed the rule and we're happy to do so retroactively. The issues that are somewhat complex in the reply, and so -- and we just overlooked the rule. So I apologize to the Court. It is never our intention to act contrary to local rules and I defer to the Court on that that one point.

THE COURT: Okay.

MR. GARFINKLE: So --

THE COURT: Mr. Garfinkle, I'm going to just allow it to slide. I've obviously read it. You're right. There's a lot of issues in connection with this matter and obviously you also had to have space for your outrage. So I understand.

MR. GARFINKLE: Yeah. Let me, let me again follow the Court's kind of outline of the issues. And we appreciate the Court's ruling and again, acknowledging the Judge Drain did rule following the Quantum Foods decision that McKesson gets a setoff issue. What he had left unresolved, as the Court read from the transcript, was -- and this was the issue that we were dealing with plaintiff when they were represented by their prior law firm -- their second law firm, I should say -- was the amount of the 503(b)(9) claim.

And there was a disagreement about certain components of the 503(b)(9) claim that weren't, we believe, very large, but they were unresolved so the judge said, you guys got to try to work that out. And I -- you people, I should say. I don't want to be gender specific. You people need to work that out. Then we got new counsel.

What we did not discuss, candidly Your Honor, at that at that hearing in September of 2019, was this, what I will call the increasing amount of the 503(b)(9) claim by virtue of any preference recoveries on account of payments for 503(b)(9) goods. That was never discussed. It was never -- we never got that far during the hearing. We actually -- as I walked out of the hearing, I recall having a discussion with prior counsel saying, you understand now you are suing for 503(b)(9) goods for which we're going to get an increased dollar amount.

And let me go to that point, because it'll explain why I think this whole analysis about 502(h) is really a red herring. The Circuit, the Second Circuit dealt with this in part in the 502(d) analysis case, the ACS case where the plaintiff in that case sought to disallow the 503(b)(9) creditor's claim under 502(d). And the Circuit said no, 502(d) doesn't apply to an administrative claim. The same analysis could be said about 502(h) with respect to an administrative claim.

Administrative claims are governed by 503 of the code. 503 says, A, an entity may timely file a request for payment of administrative expense or may tardily file such a request if permitted by the Court for cause. And then 503(b) lists what are the administrative claims.

Now, I don't expect the Court to know this, but early in the bankruptcy case, given that A&P was a retailer, it asked for the establishment of a bar date including a bar date for the assertion of 503(b)(9) claims. It provided a standard form that had been modified from the national form for which creditors could indicate the amount of their 503(b)(9) claims. And at this point, as I understand the math of the case, there's about $40 million of unpaid 503(b)(9) claims.

Again, as in the winddown order which the Court may be familiar with, those 503(b)(9) creditors, except for McKesson, have received an approximately 20 percent distribution. There's no dispute about that. There is a possibility that that distribution could increase but they've already received 20 percent and according to the operating report and some representations made to Judge Drain last week, approximately 20 percent of McKesson's $1.75 million current 503(b)(9) claim has been reserved. Has not been paid. It's been reserved.

So unlike many of the cases -- and Your Honor, I

also judged Duberstein this year. I had the privilege of doing it on Sunday and actually judging the winning team from Howard who were amazing in my opinion. And so I'm quite familiar with the -- this temporal issue, but we don't think really -- and I'll explain why we don't think it's a real issue here, because in all of those cases, including the Beaulieu case and Friedman's, there was actual full payment of the 503(b)(9) or the administrative claims in the case of Friedman's, which were employees who -- were employee who had a critical vendor payment made post-bankruptcy.

This case is not a full pay case and in fact, the Beaulieu case, which plaintiff cites, in their third section said the temporal limitation does not apply in a situation where the creditors are getting paid in full on account of their administrative claim. That is not this case and there is no case that has held this double recovery concept in terms of the limitations of 547(c)(4) applies in a case where the administrative creditors haven't been paid or -- and won't be paid their full amount.

So I just want the Court to understand where we're coming from on that issue. So we go to --

THE COURT: Can I pause -- can we pause for a second, if you don't mind? So I understand that. I think the issue, which I hate to say it this way, but I don't

think -- I think the problem is that the code was amended to put in 503(b)(9) and while Congress could have made things clearer, it didn't. And that's where you have to try to figure out how to harmonize statutes where I don't think -- I don't think someone really thought about, well, how does this interface with the preference statute. They should have, but I don't think they did.

MR. GARFINKLE: Can I address that point, Your Honor?

THE COURT: Yes, of course.

MR. GARFINKLE: Okay. Yes. Let's back up a moment. 503(b)(9), and look at the case law on the 503(b)(9), there's no legislative kind of commentary as to why 503(b)(9) was put in there. Having litigated this issue in the Sixth Circuit and won this issue in a case called Phar-More v. McKesson, that was appealed to the Sixth Circuit, which was decided in 2005, right as BAPCPA was enacted. 503(b)(9) has many different kind of views of it.

One is, on the eve of bankruptcy, Debtors shouldn't be buying goods on credit and we're going to protect those vendors from basically fraudulent activities akin to the 2702 reclamation remedy that was really becoming ineffective by virtue of the floating leans on inventory. And, so there's one way -- basically it's a creditor-vendor protection statute.

The reason why I don't think you need to worry about harmonization of 503(b)(9) payments or payments pre-bankruptcy on account of 503(b)(9) goods, we're dealing with a 20-day window here. In most instances, the credit terms for those are going to be extraordinarily short and so you're going to fall into the contemporaneous exchange of new value defense; hence why most Trustees -- in fact, I can't find any reported or even talked about case in which a Debtor or Trustee has ever sued for a 503(b)(9) payment because the credit terms are so short, you're really falling into a contemporaneous exchange of new value situation and a defense in that regard.

As the Court knows from reading the transcript of the September 2019 hearing, the payments made during the week of the 13th through 17th of July 2015 for were on account of one-day goods. We point this out in our motion. So we moved for summary judgment. The Debtor filed an opposition saying we didn't intend that to be contemporaneous. The judge said that's a tribal issue of fact and we haven't brought that back before the Court and if need be, we would try that issue at trial.

But what I'm kind of telling the Court is, for the most part, 503(b)(9) goods never become the subject of preferences because most Trustees, in fact, I would say almost every Trustee or Debtor never sues to recover them

because the credit terms are so short, you're going to follow in the contemporaneous exchange of new value defense.

So -- and I don't think there's a lot of -- necessary to harmonize this because if the preference defendant has to give back payments on account of 503(b)(9) goods, 503(a) gives them the right to file administrative claim either timely or tardily, and so you don't get to a 502(h) analysis. But even if you do get to a 502(h) analysis, we come into a bunch of cases that have all come to the same conclusion.

We cite the Falcon Products case as an example where Judge Schermer, an excellent judge in St. Louis who I've appeared in front of a couple of times when he was on the bench, said, no, Blue Cross Blue Shield is going to get a priority claim under 507(a)(4) which is again different from 502(h). It has a priority claim for the pension contributions which it paid. Similarly, the First Circuit said the same thing for a secured creditor who has 506 status.

So the Courts that have looked at this for preference defendants in different contexts, albeit not in the 503(b)(9) context, have said that the preference defendants, it's a wash. And this is consistent, Your Honor, with basically an unbroken line of Supreme Court cases on setoff dating back to 1841. In our motion for

summary judgment on the first go around, we cited to the Court, the Gratiot v. U.S. case. Cite is 40 U.S. 336 (1841). Still good law. I always loved Judge Holden in Yakima, who along with Ken Klee wrote a treatise on Supreme Court bankruptcy cases. He always reminds me and others that listen to him that even though they're old Supreme Court cases until they're reversed still are the law of the land.

And the Supreme Court in 1841 said, "It is but the exercise of the common right which belongs to every creditor to apply unappropriated monies of his Debtor in his hands in extinguishment of debts due him." That was followed up in 1909 by the Page v. Rogers case, another Supreme Court case. And this is cited in our opening motion. "It is entirely practical to avoid the circuitous proceeding of compelling one to pay into an estate only to get it back."

That's followed four years later by the Studley decision, Studley v. Boylston National Bank. Cite is 229 U.S. 523, holding that the right of setoff always allows entities that owe each other money to apply their mutual debts against each other, thereby avoiding the absurdity of making A pay B when B owes A. And we cited this in our original summary judgment motion.

Again, this is unbroken Supreme Court precedent on setoff in a bankruptcy case. So when we get to -- again,

I'm kind of switching the order of this in the Court's summary, when we get to the 502(h) issue, we don't think that's really relevant because 503 is the relevant statute. 503 gives McKesson an administrative claim. If it were to have to pay back any of the goods which it delivered -- - payments on account of goods which it delivered during the 20 days of bankruptcy. It's automatic. We can then get to the value of those goods which we'll talk about in a moment.

And so mathematically -- and we tried in our motion for summary judgment to really focus on the math. When we look at the math during the week of July 13th through 17th of 2015, there were six payments. Five of those payments were on account of 503(b)(9) goods. One was not. That's -- I'm just using round numbers -- it's roughly $900,000.

So we're not seeking a summary judgment on that one. We still think that's ordinary course of business. It was paid on its due date, all the other things that we argued to Judge Drain back in September of 2019. But as to the other ones that were done that week, those are all 503(b)(9) claims. We then go into, because the payments happened under normal circumstances on Fridays, we then go into the July 10th payments. This is July 10, 2015. And by the way, when you do the math, Your Honor here, the payments during the week of before bankruptcy aggregate $10.1

million.

And we gave the Court Mr. Burke's calculations of the new value, again, setting aside the temporal argument we'll get to in a moment, is $9.7 million. So our maximum, McKesson's maximum exposure using Mr. Burke's analysis is covered by that last week of payments. Plaintiff comes back now in its papers -- I'm going to set aside its demonstrator, which is putting up new arguments really, at some level -- says no, that number should be $10.6 million. So that would mean mathematically there's another $450,000 of excess liability beyond the payments that were made during the week before bankruptcy. Again, I'm using round numbers. Our briefs have the precise numbers here and I -- just so the Court is aware of that.

That takes us into the 23rd payment, which plaintiff is seeking to recover and that's a $3.5 million payment on July 10, 2015. That again is 503(b)(9) goods. So regardless of whether -- and that's a $3.5 million. So when you do the math and you think about it just arithmetically, that if we have this setoff, right, really it doesn't make a difference whether we are at 10.1, 10.6, 11.6 because the way the math works here. Because that payment on July 10th for $3.5 million on account of 503(b)(9) goods would still be subject to the setoff case law and Judge Drain's ultimate ruling that McKesson is

entitled to a setoff of its 503(b)(9) claims.

So I just wanted to address that structure here as to why we think this is an exercise in futility because it's just circular. It's circular. You're always getting back to the same point and this is what the case law holds, albeit in secured creditor status or priority claims status. Yes, there's never been a case to date that's dealt with it from a 503(b)(9) status, but really the analysis is ultimately the same and we think that should be followed.

Turning to valuation of the new value. Again, we don't think the Court has to go there because of the way the economics work and the math works, but as we point out on the calculation, there are two issues which the plaintiff raises on calculation -- in disputing our calculation of new value and then I'll turn to what was the subject of the Duberstein competition, the temporal issue, and then address any other questions the Court has.

There are two issues that plaintiff raises. One is this $127,000 claim that plaintiff says you can't prove or you haven't proven that you delivered these goods. And what we point out, Your Honor, is we give the Court the invoices. We give the Court Ms. Page's testimony by way of declaration saying, I was director of pharmacy operations for 23 years. I've reviewed thousands and perhaps millions of invoices from McKesson. I've never had a situation where

McKesson had an invoice for goods that we didn't receive other than once when a McKesson delivery truck was destroyed during Hurricane Katrina.

Now, what we pointed out in Footnote 10 of our reply brief is The Drug Safety Act of 2013. And this was a statute enacted out of a concern by Congress that that all the parties in the in the distribution chain of pharmaceuticals be able to trace those goods, should there ever be a recall or other problems with the pharmaceuticals and be able to, you know, trace their lineages. So that statute imposes very stringent reporting requirements and inventory record requirements on all parties within the chain.

And we cite to the Court -- give me one second, Your Honor. My computer has gone black on me. We cite --

THE COURT: Oh, no.

MR. GARFINKLE: No, sorry. It's all right. We cite to the Court -- they just -- we go dark after, if you don't type in the computer for a period of time. In Footnote 10, we cite to the Court, the Drug Supply Chain Security Act of 2013 which is codified at 21 USC 581 et seq. And 582(d) is the section of that statute which imposed record keeping obligations on every dispenser of pharmaceutical products, and specifically -- and we cite to a subsection, it's 582(d)(1)(A)(iii) of that statute. And

it requires every dispenser to maintain these pharmaceutical product records for not less than six years.

Now what Ms. DeVito says is, I don't know how to access those records and so I can't verify whether McKesson delivered them. On the other hand, McKesson gives its records. It gives the deposition testimony or the declaration testimony of Ms. DeVito, plus one other thing. We have provided the Court with the extension agreement that was negotiated in late August, early September 2015. And in that extension agreement, before plaintiff, the Committee got involved in this litigation in McKesson, the Debtor and -- and before Ms. DeVito had any involvement in any of this, the Debtor and McKesson agreed that McKesson's then 503(b)(9) claim was $2,780,000.

Now, that number went down by a million by virtue of an extension fee which McKesson agreed could be applied to reduce its 503(b)(9) claim. So that takes it down to $1,780,000. Now McKesson, in its summary judgment motion on the claim objection says actually we've done some more calculations and that number is exactly -- and I'm again, rounding, using round numbers -- $1,750,000.

So there's now three data points that the Court has on our side of the equation for that 127. On the other side is Ms. DeVito's testimony. It says I can't -- we're unable to or don't have access to the Debtors' inventory

records to show whether these pharmaceuticals were received at the store level. Now McKesson can't -- doesn't have access to those records, as Ms. DeVito explained -- Ms. Page explained in her supplemental declaration. So we don't think that $127,000 issue is really a alive issue.

We're entitled to summary judgment on it. There's just -- they have no evidence to the contrary and they have a statutory obligation to have those records because it's a transaction. So they would have had to keep those records for six years from the point of time, not only did they receive them, but for the point in time they dispense them to patients so that the patients, if there's a problem with the product, can be alerted to that there's a recall. This is a very complex system governed by regulation promulgated by the FDA, but it controls all pharmaceutical products.

So let me then go to the second item that they challenged the calculation of new value, and this is the contention that the invoice price shouldn't control. Now, in the extension agreement, again, before the Committee was involved, before Ms. DeVito was involved, the Debtor and McKesson agreed that the pricing of all deliveries before the bankruptcy case was consistent with the contract and the language -- we quote the language in our reply brief.

Now, the Committee comes back and said, under your contract, the Debtor may have been entitled to rebates and

so therefore your contract price should be reduced by 20 percent for the generic pharmaceuticals which comprised a component of the new value calculation, to which we, in our reply, point out, you're not entitled to them. One, they were conditional. You didn't meet the conditions and the Debtor agreed in the extension agreement that they weren't entitled to them.

So we don't think these are real issues but again, getting back to the fundamental point is even if they somehow get up to $10.6 million, you're still into the 23rd payment of $3.5 million, which is 503(b)(9) goods.

So let me turn to the Duberstein issue which was one of the two issues in the Duberstein competition on the temporal timing of payments under 547(c)(4). I'm going to -- unless the Court wants me to, I can go into the unpaid new value case law, which I know the Second Circuit hasn't issued a ruling on, but other Courts within the District, bankruptcy courts have rejected the Seventh Circuit's aberrant decision. I think every Circuit now has said, no, the Seventh Circuit's wrong in that regard and no one's followed it since the Seventh Circuit made that decision in the mid '80s.

So, but unless the Court wants me to address that issue, I will -- I mean, I'm happy to if you want me to, on unpaid new value versus paid new value.

THE COURT: It's up to you. I've obviously read the cases. This is not an issue that's new, but it is an interesting issue just in the context of this, these facts and the facts that frankly, were in Duberstein, because it is not your typical situation because of the overlay of the statute where prepetition claims are treated as administrative claims, and then also in this case largely paid, in the Duberstein case paid.

MR. GARFINKLE: Okay. Well, I -- the paid versus unpaid new value was not in the context, and most of those cases that that dealt with that is the otherwise unavoidable transfer language of 547(c)(4) that dealt with, you know, the situation where you have a recurring trade relationship with a vendor who provides trade credit and getting paid and providing goods on an ongoing basis. And so the case law has developed throughout the country mostly post that Seventh Circuit decision, which has still not been reversed by the Seventh Circuit, that it -- new value does not have to be unpaid.

Now let's go to the second, now what was the Duberstein issue, what I'll call the Duberstein issue, this temporal issue on timing of payment. The Friedman's case, as I pointed out early in my argument, the Friedman's case dealt with a critical vendor employee payment and then got sued for a preference. And the Third Circuit made the

decision that no, the determination line for -- and that was a prepetition claim that got paid post-petitions, albeit a wage claim, a priority wage claim, and said no, that for purposes of 547(c)(4), for that statute, that the cutoff date is bankruptcy petition date.

And there's been other cases around the country that have similarly held. There's a couple of cases out of the Middle District of Tennessee and the like. The only case or the primary case that plaintiff cites is the Beaulieu case -- I think I'm pronouncing it right -- out of the Northern District of Georgia and based on a decision out of the 11th Circuit, the trial court -- the bankruptcy court in that Court said that there is no temporal limitation.

But within that decision, and I pointed this out, Section 3 of that decision makes clear that there must have been, or in that case there was a full reserve for payment of 503(b)(9) claims. That is not this case. All we're talking about here is a potential 20 percent recovery on McKesson's current $1.7 million reserve. So McKesson is not getting a double recovery here. So, that analysis goes out of the window.

Now, you're dealing with a partial payment, contingent, partial payment, because plaintiff says, we don't get any of it for lots of different reasons, what I would call the whack a mole. Every time we get an issue

resolved, I'm always seeing I'm relitigating it in this case. But we're not getting that payment in full. And so when you look at the case law on this temporal limitation, and we point this out in our reply brief, it's all on account of full paid administrative claims.

I don't think, Your Honor, this distinction between pre and post nature of administrative claims really is relevant here. I don't think Congress decided that 503(b)(9) claims, prepetition claims for the delivery of goods during the 20 days before bankruptcy get administrative credit treatment. Judge Drain says that's a setoff right as against any preference liability that you may have.

So I don't think this this distinction as to when the claim arose, pre- or post-bankruptcy, is really relevant for purposes of 547(c)(f) analysis. I don't think the case law supports that.

THE COURT: Okay, can we pause there for a second?

MR. GARFINKLE: Yeah.

THE COURT: So I think the issue that comes up with that, sort of -- no doubt this was discussed when you were judging Duberstein, I'm sure by parties. You know, the issue is just that the preference period is obviously delineated period that happens prior to the proceeding and in every -- that's caught up as of the date of the

proceeding, and the unique things that the 503(b)(9) statute does is, A, provide for treatment of the only thing just about in the Bankruptcy Code where somebody gets an administrative expense claim for something that happens before the bankruptcy filing, as opposed to something that happens after the bankruptcy filing.

And number two, the fact that then there could be payment of that, which in this case was partial, in some cases, could have been full, that also occurs, some of that, post-petition as opposed to prepetition. Obviously here, some of it occurred prepetition, and -- but in the hypothetical, you know, that that was discussed there. Obviously, some of it occurred post-petition in that circumstance.

And I think that it's struggling to fit that within the context of the new value defense under the Bankruptcy Code and how does that work, because you're, in essence, providing a unique -- you're offsetting a -- I guess you're providing -- you're looking at new value from a unique situation where every other new value defense, if it was not ultimately determined by the Court to be valid, would give rise to somebody having an unsecured preference claim, and here, obviously if there was a payment, even if there has been a payment prepetition, and here the issue is that because you have the 503(b)(9) issue, you have a

possibility of that becoming an administrative claim. And then the argument that some people are making as to that being sort of like a double count.

And I realize your argument here is that obviously because even if you get this administrative claim, it's not a double count because you're only going to get paid part of it, a very small part of it, it's on the plan and where things are at the moment, but I think that's why this issue comes up and Congress obviously didn't even think about it or try to harmonize it.

I just don't think it did. And that's why I think parties get -- you know, find this an issue to be interesting because, you know, you're -- I don't want to say you're mixing timeframes, but you're in part mixing time frames and you're mixing payment priorities in the context of something that normally only looks at either unsecured claims that are all prepetition and were -- denominated something as an administrative claim or something that is a, you know, secured claim where you have obviously issues that are different with liens.

So I think that's why this is an issue that -- it's not, you know, Congress didn't really think about this issue coming up and obviously I realize here, there might not be the, as you say, hundred percent recovery issue and that may be a distinguishing factor here. But you know,

there's still an issue of how this all fits together in the context of the code.

MR. GARFINKLE: Well, Your Honor, can I just address that point, and I'll -- then I'll pass the podium, I think, because I've spent a good deal of time, but I can also address -- the current reserve for McKesson on account of its $1.75 million administrative claim is $260,000. Okay? So in the -- I'm looking at the plaintiff's demonstrative. They throw in the million dollars and say that is a distribution on account of McKesson's 503(b)(9) claim.

THE COURT: No, it's an offset under the contract, I think.

MR. GARFINKLE: It is not a -- it was not. The contract speaks for itself. The extension agreement speaks -- it was an extension fee. It was not --

THE COURT: Right.

MR. GARFINKLE: -- account.

THE COURT: Right, but you weren't paid it.

MR. GARFINKLE: It was not payment on --

THE COURT: You weren't paid it, as I understand. It's an offset right?

MR. GARFINKLE: Yes. It was an offset against future rebates that we -- and the structure was -- but once that was done, we would -- McKesson would voluntarily reduce

its 503(b)(9) claim from $2.75 million or actually -- to what it is now 1.75. So, McKesson never -- as to the million dollars, it never got a payment on account of its 503(b)(9) claim. Let's be clear about that. That's number one. The extension agreement -- as to the two -- let's take the Court's -- let's walk through the Court where it was in the temporal problem.

So let's assume for argument's sake that McKesson does get a $260,000 recovery on its $1.75 million 503(b)(9) claim. Let's play that out. That would mean that McKesson's new value calculation would increase from the current amount of $9.7 million has shown Mr. Burke's declaration, to $9.9 -- approximately $9.96 million. I'm using round numbers again.

That would still put you within the week before bankruptcy payments. We have not exceeded that. Those payments again are at $10.1 million. So we're back to this this circle, Your Honor, of being that McKesson gets a 503(b)(9) claim for that last payment, for the payment made on July 13th, which is the payment that we're now into, on account of a 503(b)(9) claim. So while this is a really interesting academic exercise, I don't think the Court needs to go there --

THE COURT: I get what you're say --

MR. GARFINKLE: -- mathematically.

THE COURT: Okay, Mr. Garfinkle, respectfully, I get what you're saying. But the issue isn't whether I think it makes sense that you all are having this argument over relatively de minimus amount of money in the context of this case and -- or the fact that you haven't been able to get to an agreement in like three years, five years, whatever it is over these matters.

I mean, it -- that's not the issue. The issue is you're here now. You're stuck arguing it, whether it makes sense to ever have a trial over this or get to these issues, that the issue is whether I can grant a summary judgment because there is an undisputed issue of law and where I'm having trouble with some of these issues is I don't think they're undisputed.

Maybe they're not disputed very well -- sorry to put it that way. Maybe there's not a lot of evidence that supports the dispute, but there's disputes and that's what I'm having trouble with. So I'm trying to focus on the fact that, you know, of the -- less of the math and more of the law because I think at the end of the day, unfortunately, whether this makes any sense or not, there's obviously issues of law that I can decide that are in front of me in this matter.

But how that works into the math is going to be a different story, possibly, because you may not -- I may not

be able to grant summary judgment on the math based on what's before me, whether I think they're good arguments or not, because the standard doesn't let me determine for summary judgment motion, you know, whether or not there's, you know, I think it's a winning argument or supported by the preponderance of the evidence or I think that their evidence is good.

That isn't what I'm supposed to be deciding based on, and that's the problem I have with some of these arguments, because there are arguments, again for summary judgment on the other side and what I'm trying to understand is really, you know, the legal side of this myself, because again, I just think that that it's clear to me, people have disputes. Look, you may be completely right that they should have access to the system, they should be able to do this, they should be able to, you know, determine that you -- that there was delivery of these goods.

Their argument back is you haven't provided them with like a piece of paper that shows from the shipping agent that there was -- that these were delivered and that according to their records, they can't find proof of delivery. All right, well, what is that? Is that a triable issue of fact? It might be. Is it a waste of time because at the end of the day, this ends up in a zero recovery? Yeah, maybe.

But if people keep going down a road where there's going to be -- where there has to be a trial and spending money because there has to be a trial, yeah, you're right. You may be spending a lot of money ultimately on a trial litigating a trial where the recovery is going to be zero against your client, whether it makes any sense or not. But that's not my -- that's not up to me.

MR. GARFINKLE: I hear Your Honor, and my point was not that you couldn't -- that there aren't some issues here that are, maybe, we don't we don't think they're -- we think they're ripe for summary judgment. What we're saying is even accepting plaintiff's arguments as true, based upon the math, McKesson still is entitled to summary judgment. That's mathematically the result and that's what we're trying to argue. Maybe I haven't explained it, articulated it right.

We'll accept for argument's sake all of their points. But once you come back to this point of -- and it kind of goes back in the circle, that if I have to pay back a 503(b)(9) payment, McKesson is entitled statutorily to a 503(b)(9) administrative claim and we get back to Judge Drain's setoff ruling. And with all due respect to my opposing counsel, Judge Drain also made a ruling when he denied their motion for summary judgment, denied their motion for leave to amend, and then subsequently denied our

motion to dismiss the amended complaint, he limited the equitable kind of claims that plaintiff could make to try to defeat McKesson's claims in the bankruptcy case.

And as we point out in our apply, they're relitigating those same issues and we find that one to be the most, I don't know, frustrating is probably the best word I can describe it, that --

THE COURT: I used outrage, but that's okay.

MR. GARFINKLE: It's frustrating, Your Honor, because it's -- as I said earlier, I feel like it's whack a mole. Every time I get an issue I think resolved or judge -- or somebody makes a ruling, I get it repackaged as a different -- in a different form and fashion. That goes to these new breach of contract claims which are being asserted by way of defenses to our claim, even though they never filed an objection to claim based on that.

And I haven't talked about that summary judgment motion, but again, it's just frustrating, Your Honor, because I -- it is truly whack a mole with this. Every time I think I have an issue resolved and Judge Drain says, go forward based upon this understanding of how I view the law, I'm having to re-deal with the issue in a different form and context. And I'll just leave it at that. So I'm happy to address any other things I haven't addressed and turn the podium on to my opposing counsel.

THE COURT: Okay, thank you.

MR. GARFINKLE: Thanks.

MR. MILIN: Good morning. Still morning, Your Honor. Welcome to A&P v. McKesson. I'd like to begin with just a few comments about what Mr. Garfinkle had to say. Most of it, I will address in the course of addressing the particular issues in our demonstrative, but you know, Mr. Garfinkle would be frustrated less often if he took a more open-minded view of what's actually been decided and what's actually been conceded than he seems to.

For example, he misreads Judge Drain's decisions on amending the complaint which you just mentioned, and I may return to this, but that was about a fishing expedition, not about shielding the clear inequitable conduct that we have brought to the Court's attention.

Focusing on the facts -- on the law for a second, we don't intend -- you know, we continue with our views about what Judge Drain decided. I understand Your Honor's interpretation that that decision decided the setoff right with respect to the fixed claim that McKesson asserts, but Mr. Garfinkle suggests that that decision was following Quantum Foods and my only point is that Quantum Foods was about a B-1 post-petition claim, not about B-9 prepetition, but I'm not going to discuss that issue further.

Secondly -- I'm sorry? Secondly, Mr. Garfinkle

relied as his papers rely on the ASM case, but he doesn't address something that we pointed out and that we think is rather important, which is in Footnote 2 of the ASM case, the Court says, "Neither party has suggested that Section 503(b)(9) has any relevance to this appeal and we do not specifically address its interaction with Section 502(d)." So I just think that in looking at that case, it's important to keep the Court's express limitation in mind.

Mr. Garfinkle said that there's no commentary on the purpose of 503(b)(9). We cite a couple of cases saying otherwise and it certainly isn't the elimination of preference liability, but I'll get into that in a minute.

The last point I just wanted to address quickly is that Mr. Garfinkle says that 503(b) gives McKesson a claim. It doesn't need to look to 502(h), and that's not right because McKesson has been paid. It has no valid claim under 503(b)(9) for the preference of the -- for the sums that we seek back as preferences.

The only way McKesson can get a claim for those sums is through 502(h), but just with those, the rest I think our position will become clear as I proceed with the motion. I'm sorry I'm not sure that I announced myself as Richard Milin, but I am Richard Milin on behalf of the Committee, on behalf of the estate.

Now, first of all, since as Your Honor has

recognized, there are a number of issues here. We count four subsequent new value issues, seven 503(b)(9) issues, and eight setoff issues for a grand total of 19, not including, as they say subparts. And as Your Honor noted, it's beginning to our -- well, something like four are issues that this Court will have to decide with very little guidance or no guidance from other cases, and I just wanted to thank Your Honor for taking the matter on.

So Your Honor has seen our demonstrative. We're not asking that it be admitted into evidence. It's not a summary of our evidence. It's not new arguments. It's not a Sur-Reply. It's only intended to outline all of the major issues as we see them and how they fit together and give a guide to our oral argument and hopefully to Your Honor's decision making. So with that, I would propose to go ahead and deal with individual issues in what seems the most logical order, beginning with the proper amount of potential liability net of subsequent new value, then discussing the proper amount of the 503(b)(9) claim, and finally turning to McKesson's request for setoff.

If the Court prefers, I can prefer in some other way if any of the numerical issues about which I have very little to say with the exception of the inflated invoice point, I'm happy to move on from those as they come up. Before I start, Your Honor, questions, comments or shall I

move forward?

THE COURT: No, you can move forward, please.

MR. MILIN: All right, very good. So turning then to the subsequent new value issues, our analysis of defendants "maximum preference liability" with one key exception, starts where defendants start. That's on the second page of our demonstrative and it identifies the issues and calculate their significance. As an initial matter, we have argued that -- well as an initial matter, the complaint seeks to recover $67 million in preferential payments but defendant's starting number is only $9.7 million and as Your Honor is aware, the difference results from defendant's inclusion of paid new values as part of its subsequent new value defense.

That issue, Your Honor is well familiar with. There are -- not all cases in this district say that non -- paid new value accounts as subsequent new value. We cite Pamlico and Teligent. The Seventh Circuit, as Mr. Garfinkle said, held that new value must remain unpaid and we think that it's bad policy to count paid new value, particularly here, because defendant's next day payment terms which it imposed unilaterally in the 20 days before bankruptcy and its threats to discontinued shipment gave defendant all the incentive it needed to continue doing business with A&P.

However, we understand that more cases and more

recent cases have held that new value need not remain unpaid. Our position is simply that the Second Circuit hasn't spoken and defendant isn't entitled to reduce its profit liability by more than $57 million dollars unless this Court rules that it can. We have argued for the reasons in our papers that it shouldn't because it's inequitable, but having said that, I'll move on.

So even if the plaintiff is entitled to the benefit of paid new value, it's not entitled to more than the value the Debtor actually received and we've objected to the SNV defense as the defendant has calculated on two factual grounds and on an additional legal ground as our demonstrative states. I plan to address these issues briefly, focusing on responding to defendant's arguments unless the Court has questions.

So first, the defense should be reduced by $742,771.88 because it's based on inflated invoices. And there's no genuine dispute about the facts. A&P paid by a two-step process as both the supply agreement and defendant's 30(b)(6) witness agree. In essence, defendant marked up its invoices by 20 percent but eliminated that markup with a rebate, which the supply agreement required defendants to pay before the invoice was due about two-thirds of the time. Because of this two-step process, if A&P received an invoice for $120,000 for one-stop generic

products after the 11th of any month longer than Friday, defendant paid A&P a $20,000 pre-bate; that is, A&P actually had a $20,000 rebate in hand before it was required to pay defendant it's $120,000.

As a result, A&P's out of pocket cost and the true price it paid and the actual value of the merchandise purchased is only the net amount of $100,000. And even when A&P purchased earlier in the month, the two-step payment process and contractually specified payment dates meant that A&P received its rebate very soon after it paid its invoice. The rebate was paid every month until the petition date. These facts are in the DeVito declaration, Paragraph 48 to 68, and in the exhibits and testimony she cites.

Crucially, defendant offers no facts to the contrary. Instead, defendant tries to claim with no citation to anything, that the rebates were somehow contingent, but it doesn't identify a single occasion before the petition date on which the rebate wasn't paid. Now defendant did unilaterally take the June 2015 rebate back without consent or Court permission, four months after bankruptcy. And it also withheld the July rebate which was due in August after A&P's bankruptcy and before the extension agreement restarted the rebate program.

But that doesn't change how the parties actually did business before the petition date or the true value of

the goods defendant delivered or the fact that the rebates were not truly contingent. In fact, defendant itself calculated A&P's net price in its rebate reports as shown on DeVito Exhibit 9. So defendant argues that the Court should ignore the substance of the parties' transactions and rely on inflated invoice prices instead for three untenable reasons.

First, defendant relies on the Bethlehem Steel case for the proposition that "where a contract exists, the contractual rate is the reasonable value of the goods." There's a couple problems with that. First, Bethlehem Steel only establishes a "initial assumption" in favor of the contract price, which is only "viable" unless the Debtor introduces convincing evidence to the contrary. And we rely on the words of the contract itself and defendant's 30(b)(6) witness. Evidence doesn't get more convincing than that.

But even more importantly, we don't dispute the contract price. Our point is that the invoice price and the contract price are not the same because the contract specifies that two-part payment process and it says that A&P will pay the invoice minus the markup. By the way, defendant also relies on Globe Metallurgical, but that case actually scheduled an evidentiary hearing to determine whether the contract rate correctly reflected the value of the goods at issue.

Defendant's second argument is that "Plaintiff must show that in the open market, Debtor could have purchased those same goods at their proposed discount pricing rather than at the contract rate in the invoices." In fact, neither of the cases defendant cites even comes close to supporting that proposition. Gonzalez merely finds, based on very different facts, that the invoice price at issue represented what a willing buyer would pay a willing seller.

And Pilgrim's Pride concerned a mixture of goods and services, so there was no relevant contract rate or invoice price for the goods and issues at issue, and that's why the Court had no option except to look at the market and that's in Footnote 13 of the case as well as elsewhere.

So even if defendant's proposition were correct, it doesn't apply here. We aren't arguing that defendant's invoices don't reflect true value because they are above the market rate. We're arguing that defendant's invoices don't reflect the discounts in defendant's own contracts. Market price is simply irrelevant.

So finally, on this point, defendant makes several arguments premised on the notion that plaintiff seeks to reduce its SNV calculation because of rebates. Defendant's confused. Plaintiff seeks to reduce the SNV calculation because it is based on overstated invoices. We're not

asking defendants to turn over a rebate in response to the current motion. We're only asking that it should not overstate the value of the goods it delivered. The rebates are only relevant because they equal the amount of the overstatement, not because we're asking defendants to give them back, at least not today.

So the next correction as the -- as our demonstrative shows, is the $127,000 for unproven deliveries. Your Honor stated the issue very well. I don't know that I have much to add. It's very simple. We asked them to prove that the goods were actually delivered and they've never been able to do so. Instead, they pronounced their invoices as conclusive, even though they were issued late, have the wrong payment dates, include shipments to inactive pharmacies, and specify DNS, which may mean do not ship, as the shipper's (indiscernible).

The defendant also tries to blame Ms. DeVito for not searching records she doesn't have, but fundamentally, defendant can't escape its own burden of proof. If you want someone to pay you for goods that you say you sent them, you have to be able to prove that the goods were actually delivered. That's all there is to it. And because discovery is now closed, we respectfully suggest that judgment should be entered in plaintiff's favor because there's no genuine issue here for trial. All of the

evidence is before Your Honor.

So if I may take it quick drink because my throat is gone.

Last challenge to defendant's SNV defense is that defendant should not be allowed to double dip and we heard a little bit about that earlier. As the Court knows, there's been a lot of debate about it, it's the subject of the Duberstein court competition and it's squarely presented here with more than $1 million dollars at stake. Second Circuit hasn't addressed it.

Now, defendant wants to double dip by including all of the goods in its 503(b)(9) claims as part of its SNV defense as well. If a creditor can do that, it will receive twice the value of its merchandise. First, it will receive full value, absent administrative insolvency, which I'll turn to later, because it will have an administrative priority claim under section 503(b)(9). And second, it will receive full value again because it can use the same merchandise as SNV to reduce its preference liability dollar for dollar.

Given how many creditors receive little or nothing in bankruptcy proceedings, it's unconscionable to allow any creditor to receive the value of its merchandise twice. And yes, defendant won't get the full value, but again, I'll come to that. As a statutory matter, the question before

the Court, as Your Honor, knows is how to interpret the requirement in the SNV Statute, Section 547(c)(4), that a creditor can only use new value as a defense to the extent that on account of the new value, "the Debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor." As applied here, the decision before the Court is whether when a Debtor pays a creditor's 503(b)(9) claim, it's making an otherwise avoidable transfer.

So fortunately, the key relevant arguments have been identified and discussed at length. There are all those Duberstein briefs which Your Honor had to read and there's Friedmans, which is a Third Circuit case about wage orders, which defendant relies on. We rely on Beaulieu which I think the French would pronounce Beaulieu, which is a later Georgia bankruptcy case that analyzes and specifically rejects the Third Circuit's argument.

Both Friedman's and Beaulieu agree about most of the key issues. For example, they both conclude that a distribution can be a transfer and that a Debtor -- the word Debtor can refer to the post-petition Debtor as well as the prepetition entity. But Friedman's concludes that post-petition payments can't be considered based on the context of the statute and Beaulieu concludes that post-petition payments can reduce the preference liability based on the plain statutory language, sound bankruptcy policy, and of

the analysis and rejection of Friedman's counter arguments.

We submit that the statutory language is controlling as most courts have held; for example, in deciding to pay new value -- I'm sorry. We submit that the statutory language is controlling as most Courts have held in ruling on paid new value issue. We also submit that the inequity of double payment makes following Beaulieu and barring double payment, the only just course.

So there are a couple of relevant facts which were discussed before. First, as Your Honor noted, defendant was already paid a full $1 million of its 503(b)(9) claim back in 2016, dollar for dollar. The fact that it was paid by setting off against the rebates is -- makes no difference. What defendant wants to argue is it should be allowed to keep the million dollars and claim it as SNV which would be full double payment by describing it as a fee. But names don't matter.

The Debtor did not agree to pay defendant a million dollars as the price of continuing to do business. The Debtor agreed to pay a million dollars of defendant's 503(b)(9) claim as a price of doing business. Defendants, in essence, trying to renegotiate that now and that's the basis -- that million dollars is the basis for what the demonstrator calls a first correction for double dipping.

The second correction, uses an uncertain amount,

because it depends on the allowed amount of defendant's 503(b)(9) claim and there are, as we'll discuss, some issues about that. Also, although administrative creditors are only receiving about 20 percent of their claims, we are only seeking to reduce defendant's SNV defense by the amount it actually gets paid under Section 503(b)(9). After all, the statute -- so the statute says that you don't get SNV credit if you've received an otherwise unavoidable payment. That can only relate, in our view, to the amount they actually get paid and that's all we're looking to stop the defendant from recovering twice.

And as to the fact that it won't receive a full double payment, we don't think that affects the Beaulieu analysis in the slightest. Beaulieu refers rather than just a double payment, it focuses on what it calls payment plus. Here, defendant wants full value for its claim in subsequent new value analysis, and we'll get at least 20 percent of its claim under 503(b)(9). So defendant will still receive payment plus if the Court adopts defendant's position.

So that, I think, with the exception of our note which is there, sort of covers the issues on subsequent new value and maximum preference liability from our perspective. Happy to address any questions about those issues or to move on to setoff, as Your Honor directs.

THE COURT: Okay I think we can move on to setoff.

MR. MILIN: Okay. So we've raised seven issues about setoff, all listed on demonstrative Page 3. Fortunately, all seven are purely factual and I've already addressed issues A-1 and A-2, overstated invoices and unproven deliveries. The correction based on overstated invoices is only $277,000 in the 503(b)(9) context, by the way, as Ms. DeVito's declaration explains, because 503(b)(9) claim only stretches back 20 days and because it only includes unpaid goods.

So issue 503(b)(9) -- issue A-3 is a $44,000 issue that like defendant's invoices and unproven deliveries, we think presents no genuine issue for trial and should be resolved in our favor. Defendant's records indicate and Your Honor has been provided with those records that $44,032.76 is owed to the Debtor for returns after the debtor closed its pharmacies. Section 7 of the parties' extension agreement states that if those sums are not returned to the Debtor they must be deducted from defendant's 503(b)(9) claim.

But defendant hasn't deducted it from their 503(b)(9) claim, and yet it doesn't deny the facts as Ms. DeVito states them. So we think the undisputed facts show that the claims should be reduced by that amount.

Next, and these are numerical issues but can also be discussed quickly, we list four additional corrections

which should reduce the 503(b)(9) claim as B-1 through B-4. Now, defendant fails to address these issues on the merits and offers no facts to dispute plaintiff's position, and we therefore think it should be denied at summary judgment in any amount that doesn't correct for B-1 through B-4.

Also, defendant reserves the right to seek the full sums at issue in cash rather than just as a reduction of 503(b)(9) claim, depending on what the full factual record shows because just applying it to 503(b)(9) lets defendant in essence keep 80 percent of the sums at issue and some of them certainly were taken in violation of the stay. So --

THE COURT: Okay, so let me ask you stop there for a second. Sorry. I have a couple of questions about that because I was -- when I read your papers, I think what I was having trouble understanding is how this ends up being -- and if it's factually correct, an offset against the 503(b)(9) claim as opposed to an offset against any other claim, because I don't think I have enough data. I might I might be wrong. You may tell me I do, explaining that this relates to the 20-day period and those specific invoices as opposed to it relating to returns that could be goods that were shipped prepetition but not in the 20-day because when you get a whole bunch of returns, you don't necessarily know that, or for example the -- I guess there's, you know, there

were some discrepancies, et cetera in their -- defendant's accounting records allegedly, but they filed a claim and so was this part of your objection to their -- the Debtor's objection to their 503(b)(9) claim? I don't recall seeing that.

MR. MILIN: Right. So a couple of things. These sums, just to be clear, $44,000 and B-1 Through B-4, are all post-petition sums. With respect to the Debtor's objection --

THE COURT: What does that mean though? Because you could have returns that happened in 2015, but how is that post-petition sums? Is it relating to goods that were shipped post-petition and it's traceable or --

MR. MILIN: Yeah.

THE COURT: -- is it something else?

MR. MILIN: No. These claims are for sums that were owed -- the parties continued to do business after bankruptcy. All of the five sums that I've just identified appear to relate and we believe do relate to the post-petition transactions. So Your Honor --

THE COURT: Okay, but then let me stop. Let me stop there for a second. But then why is that a 503(b)(9) claim? Again, this is a little tricky but you understand the issue. I mean their 503(b)(9) is treated as an administrative claim, but obviously it relates to

transactions that occurred prepetition. If post-petition there were other administrative relationships and administrative claim relationships between McKesson and the Debtor which you're saying occurred because they continued to do business post-petition with each other, then wouldn't this be an issue where either it would be offset against a -- sorry, the transactions that occurred post-petition or you would have possibly sued to recover it?

MR. MILIN: So --

THE COURT: On some theory other than as a preference, like they just showed it to you under the contract?

MR. MILIN: Understood, Your Honor. So there are a couple of things. First, this is a motion for summary judgment and being how they read decisions, we -- so long as our right to seek these claims is generally preserved, then we can figure out whether that should be done by objection to the claim or some other way. However, there is also a fact --

THE COURT: Let's stop there for a second. So the first thing is, no disrespect to the Debtor or for that matter of the Creditors Committee, but I haven't really typically seen three sets of claims objections, none of which got adjudicated relating to an administrative claim. That's odd. I'll just say to start with.

And if this isn't in those objections to the 503(b)(9) claim, I don't see how this relates to the 503(b)(9) claim for allowance purposes of the 503(b)(9) claim, at least certainly for the ones that have been asserted.

It might be that -- and I don't think your complaint, but again, you're going to be more familiar with it than me. I don't think that the complaint that's been filed already has to do with recovering amounts by the Debtor for theories that were not preferential that are just amounts due and owing under the contract for post-petition, I guess, claims and I don't -- I suppose I don't -- I would have to go back and look what law governs the contract.

But I mean, obviously there's a period of time for suing for failure to pay something under an agreement and that may not have passed. Certainly in New York, it wouldn't have passed yet, but I don't know if that's actually been commenced. And it -- I don't think it's part of this litigation, let's put it that way, from my review of it. And I -- if there was an affirmative recovery owed, I would think that that would have been asserted at some point already.

It isn't in the claims objection for the 503(b)(9) and, respectfully, there -- that's happened. You know, these claims were asserted a long time ago. There were

objections filed. This isn't in that. It's not in your complaint. I'm not saying it's time barred under applicable law, because I have no idea without looking at the complaint again. It may not be in New York. As I said, it wouldn't necessarily be if the transactions were 2017 because the six-year statute of limitations wouldn't have ended for, you know, contractual obligations.

But I don't -- I'm not sure I understand how this is a defense to the 503(b)(9) claim. That's what I'm really just trying to understand because it hasn't been raised in the claims objection. It hasn't been raised in this litigation as an affirmative claim. The judge has clearly already -- I mean we're at this late stage of this case, so it's not in this complaint that I'm aware of. So that's why I'm just trying to understand how does this fit in.

MR. MILIN: Sure. So Your Honor has raised a number of issues. I will try to (sound drops) them all. First of all, the amended complaint is not limited to preference period. It specifically seeks two sums, one for rebates, one for credits, for violation of the automatic stay and is a setoff against the 503(b)(9) claim for defendant's actions in taking $569,000 in rebates back four months after the --

THE COURT: Mm hmm.

MR. MILIN: -- and for withholding credits that

were due for return. So that's what -- the amended complaint does include affirmative recovery, seek affirmative recovery for post-petition acts. And secondly, there are some fact issues that I need to clarify for Your Honor because the -- first of all, the $44,000, I divided out the two sets of sums for a reason.

The $44,000 is specifically required by defendant's contract to be deducted from the 503(b)(9) claim. So that's why --

THE COURT: Understood.

MR. MILIN: All right. So the 327 may be the same thing. It's -- can't tell from the information the Debtor provided -- I'm sorry, the defendant provided. So it may relate for that reason. Also the 134 in part relates to prepetition issues because what happened there is in post-petition transactions, McKesson decided they must have given us a rebate for stuff we bought before the petition date and didn't pay for and just took $134,000.

So I'm just providing the facts on that. After -- as to timeliness, if Your Honor decides that we can't simply offset them as we would in a reconciliation process, I think, then we may seek to amend the complaint with respect to them. I'd hate to do that. Or we may decide that they should be taken into account with the total of six violations of the stay that defendant committed as an

argument why it should equitably be denied a setoff.

As to the objection, the objection states that the defendant had failed to justify -- provide documentation to justify its claim. Now it's clear from 2019 that the Debtor had tried to get information about the credits as well. You know, defendant reads the objection to sufficient documentation to say, as if we were objecting only concerning facts supporting defendant's position, but in our view, the objection to insufficient documentation also includes issues concerning offsets and credits that might reduce defendant's claim.

I mean, that's how claims reconciliation is supposed to work, and we respectfully suggest that there's no reason to disallow plaintiff's objections based on the defendant's narrow view, especially in the circumstances because, you know, we have evidence of concealment. We know that defendant decided to take that $134,000 back, not only without consent or Court permission, but to move it into an alternate account to keep credits that they don't want to give A&P and that they intend to take after the bankruptcy.

So, we think that's very problematic for obvious reasons. We should also point out the defendant's argument based on the objection's timeliness is disingenuous because the Debtor has been requesting documents about credits and defendant's been refusing to provide them for at least two-

and-a-half years, since at least September 2019. That history is related in Ms. DeVito's declaration Paragraph 10 to Paragraph 29 and if the issues plaintiffs raised are indeed new, that's only because defendant refused to put the relevant -- provide the relevant information and refused the Debtor's efforts to reconcile its claim on several prior occasions and worse.

Ms. Towsley misrepresented the facts about this key account that has the 134 in it and the 327 in it at her deposition. So we don't think that defendant's objection -- that the Debtor's objection should be interpreted narrowly. I'm not sure that addressed everything Your Honor, but if it didn't, I will attempt to answer it.

THE COURT: No, I think you explained to me why you're offsetting it, at least your theory for why it should be offset.

MR. MILIN: And -- I understand. I understand Your Honor. One other point that I (sound drops) about this because defendant has asserted it many times, including today, and that's what they keep saying that the extension agreement agreed that section -- their 503(b)(9) claim aggregates approximately $2,786,000. But that's not what it says. It actually only says, "A&P shall pay to McKesson an extension fee of $1 million on account of McKesson's 503(b)(9) claim which aggregates approximately $2,786,000."

That's an acknowledgment the defendant has asserted a claim. It's not an acknowledgement that that claim is valid or a waiver of the right to challenge it. So we think that that's a plain red herring. Ad as to, you know, Judge Drain's ruling which they rely on, that's clearly an apposite. It's based on -- their argument's based on a single out of context paragraph concerning standing to assert breach of contract claims based on prepetition rebates and credits and their argument's incorrect for a lot of reasons.

The relevant facts are different. The standing issue is different because Debtor has asked plaintiff to pursue its claim objections. The statute of limitations and tolling issues before Judge Drain of course were different, too. And as I pointed out, we have new evidence of affirmative concealment by the defendant. Also, Judge Drain specifically authorized plaintiffs to pursue issues just like those presented here, stay violations -- and we've identified several -- as well as defensive claims by way of setoff against defendant's 503(b)(9) claim.

And we think that the issues we've raised, whether or not Your Honor decides that that's appropriate by the way of an offset to the 503(b)(9) claim on this motion, certainly have a right to assert those claims. So you know, we conclude, based on the arguments we've just been through,

that defendant is not entitled to a judgment allowing it's 503(b)(9) claim in the amount of $1.7 million.

At a minimum, the fact (sound drops) $108,971.03 as calculated in defendant's demonstrative and as we state in the note on Page 3, that number may be reduced to zero based on the allegations in plaintiff's fourth claim for relief, which Judge Drain approved by denying summary judgment.

So that's kind of what I have on the 503(b)(9) issues. If Your Honor wants, would prefer, I'll move on to setoff issues or we can do whatever --

THE COURT: Yes, that's fine.

MR. MILIN: All right. Okay. So we've discussed four SNV issues, seven 503(b)(9) issues. That leaves eight setoff issues, but I believe with a bit of background all but one of those can be addressed quite quickly.

So by way of context, which I think is clear from the beginning of this argument, but we've been through a lot since, defendant's setoff motion seeks to set off defendant's potential preference liability against plaintiff's potential preference recovery, thereby eliminating defendant's preference liability altogether except for a single transfer. But defendant also asserts the fixed claim of $1.7 million which we've just been discussing.

As Your Honor, recognized only the fixed claim was before the court back in 2019 when defendant made what -- when Judge Drain made what defendant calls the setoff ruling, and presumably defendant will want to set off its fixed 503(b)(9) claim against any additional liability in this proceeding as well.

So all of the five issues we identify in the last page of our demonstrative as issues A-1 through A-5, apply both to any fixed claim setoff and any potential preference liability setoff. The three issues identified as B-1 through B-3 relate only to a setoff of potential preference liability.

So the first setoff issue, given that we're on a motion for summary judgment, is the defendant has failed to prove a right to setoff under non-bankruptcy law. As we showed Pages 16 to 17 of our setoff brief, defendant has the burden of establishing its right to a setoff under non-bankruptcy law, but it's made no effort to do so. Instead, it dropped Footnote 13 in its reply stating that it is "extremely doubtful New York law governs this issue."

Defendant didn't then go on to try to show that it meets the requirements for setoff under any governing law. Defendant's motion for a setoff therefore should be denied. This Court can't authorize defendant to execute a setoff without defendant even taking a position as to what law

governs, let alone showing that his proposed setoff satisfies the law's requirements. Nevertheless, we respectfully suggest that the Court should deny setoff on additional grounds as well, in order to provide the plaintiffs with some much-needed guidance.

So the second issue, as we show at Pages 18 to 22 of our setoff brief, is that defendant requested setoff would be non-mutual under 553. We pointed out the Quantum Foods issue and let me see whether we have something to say about that, that doesn't run afoul of Your Honor's indication at the beginning of this hearing that -- intent to follow Judge Drain's setoff ruling.

I should say that, you know, our time, we didn't have a requirement to try to appeal or change that ruling because it didn't affect anything really going forward. But also, defendant relies on Local Rule 9023-1 but that only required a motion to reconsider within 14 days of entry of an order, and the judge did not enter an order. So we continue to believe that our position is stated in papers about Judge Drain's ruling is correct, but we will move on, unless there's something that Your Honor would like to ask about before I move forward.

I'm sorry, should I move forward, Your Honor, or -- Your Honor?

THE COURT: I'm sorry. My apologies. I had hit a

button on my phone. Sorry. What I was saying is so I've now done the muted problem sorry, muted myself on my phone, not actually on the website. But what I was saying to you is no, I don't have any issues or things we need to discuss that further, so you can go ahead and move forward. So I was saying that, and you are clearly not hearing me. My apologies there.

MR. MILIN: That true. Thank you, Your Honor. All right. So the third and fourth setoff issues listed A-3 and A-4, are whether factual issues concerning defendant's inequitable conduct, some set out in plaintiff's fourth claim for relief and some newly discovered, require a denial of the summary judgment permitting setoff. We show that they do at Pages 1 through 4 and 27 to 32 of our setoff brief and as you've recognized, Judge Drain did not address that issue. And, even if he had, he went on to approve the fourth claim for relief two years later, which expressly seeks to deny defendant a setoff because of its unclean hands.

And it's significant, I think, the defendant's reply neither denies its inequitable conduct nor discusses the allegations in plaintiff's fourth claim for relief, nor cites a single case. That reply at 30 to 32. So again, they rely on Judge Drain, but that was two years before Judge Drain approved our right to raise equitable issues.

Plaintiff also argues that -- I'm sorry, defendant also argues that we can't seek to bar setoff based on newly discovered inequitable conduct, relying on excerpts from a hearing transcript taken out of context. So we know Mr. Garfinkle is frustrated about that, but Judge Drain actually sought to prevent a discovery fishing expedition, not to shield blatant misconduct such as defendant's concealing what appeared to be up to $2 million in sums owed to the Debtor with the stated intention of applying that money after the bankruptcy is "closed."

Judge Drain also was unaware, as we were unaware, that Ms. Towsley had misrepresented the relevant facts at her deposition. That's DeVito declaration, Paragraphs 120 to 125 and Exhibit 2. So one way or the other, plaintiff's fourth claim for relief as Judge Drain has already ruled, states facts which could justify denying defendant a setoff and defendant provides no grounds for dismissing that claim, so it should be denied a summary judgment for that reason alone.

The next issue is contingency and Your Honor expressed some skepticism about that. We understand and indeed recognize that this is only an issue because of the specific relief defendant seeks and it's timing. So we showed at Pages 16 to 18 of our setoff brief that even if defendant were entitled to some kind of relief, it can't be

authorized to exercise an immediate setoff. For more than 100 years, New York law has held that setoffs of contingent claims are not allowed. Both defendant's debt to the Debtor for preference liability and the Debtor's potential debt to defendant under 502(h) of the Bankruptcy Code are contingent.

Consequently, defendant isn't entitled to exercise a setoff. We understand the limits of that argument. We said so on Page 18 of our brief, but you know, given the procedural context and the remedy defendant seeks, it's dispositive, at least for now. Certainly, defendant's response does nothing to solve the problem. It tries to distinguish three, but only three of the five cases we've cite, and it still has to admit that contingent claims can be set off. That's at Pages 11 to 13 of their reply.

Accordingly, they argue instead that they're still entitled to a setoff because it's claims are "undisputed" and "not dependent on future events," but as we've been through and as Page 2 of our demonstrative and its note point out, plaintiff actually disputes -- it may be Page 3 -- but we actually dispute the entirety of defendant's fixed 503(b)(9) claim and any 502(h) claim necessarily depends on future events.

Now, they also assert that they can assert a setoff -- argue that they can exercise a setoff because

their claim is "not contingent." Well, that's what the reply says, but the defendant's original setoff motion said the opposite at the top of Page 7 and so did its claim motion in Paragraph 7 at page 3. And even if defendant were correct that his claim is contingent, and it isn't, defendant fails to address whether plaintiff's claim for preference liability is currently contingent, because of course it is.

So we sort of come back to where we started. New York law does not allow the setoff defendant seeks because both parties' claims are currently contingent and hypothetical, and the motion as it stands seeking the relief it seeks should be denied.

So next, unless Your Honor has questions. There are two grounds for denying a setoff specifically against potential preference liability, which defendant simply fails to address. These are points B-1 and B-2 on the last page of the demonstrative. Your Honor will have recognized that I'm play the hard issue to last, but I kind of think that we should go through simpler issues first.

So one of the arguments is at Page 26 of the setoff brief where we show that 502(h) can only create prepetition claims because that's what its plain text says. It says that the claims it creates are allowed as if they arose before the filing of the petition. Accordingly,

502(h) claims, whether or not they can be granted administrative priority, can't be set off against post-petition preference liability and defendant offers no response.

Second, plaintiff shows at Pages 26 and 27 of its setoff brief that a 502(h) claim can't be set off against preference liability because the two debts can't exist simultaneously. 502(h) won't give defendant a claim until it is paid its preference liability and at that point, defendant won't owe plaintiff a debt. It can be set off. So again defendant offers no response. I understand that that feels kind of technical, but if it's not right, there should be a reason for it and normally after all -- and New York law holds, you should be setting off actual coexisting claims, and that won't happen here with preference liability.

Someone's phone is ringing and I don't think it's mine.

THE COURT: Mine. I'm sorry -- my phone on mute. Sorry about that. It's my phone -- not my phone that I'm on. It's our Court phone because I'm actually in chambers and I'm just hoping it stops, if you give me a second. There we go. Hopefully. I'm not answering it obviously. I have a couple questions for you, though, about that while we're on the 502(h) front, so let's -- I might as well just

stop now since we stopped for a second and talk about them.

So I guess, you know, I think the argument that's being made and I'm sure Mr. Garfinkle will jump in in his, you know, response, rebuttal argument, but -- is that, you know, two things. One, while it says that it's arisen as of the date of the filing of the petition, this is one of those ones where I think Congress didn't do a very good job in harmonizing what it meant. In theory, you know, because of the 503(b)(9) claim being a prepetition claim but still being entitled to administrative expense claim, it doesn't seem like it would necessarily preclude that, as odd as that would be technically.

It doesn't say what the priority is of the prepetition claim. It just says it's treated as a prepetition claim, which I know sounds odd because we always think of prepetition claims as being unsecured claims or priority claims. We don't think of this for 503(b)(9), but technically it's a claim that arose prior to the petition date oftentimes, but has a different priority. So that's one argument I could see someone making about this.

And then the argument that I think was clearly being made by Mr. Garfinkle is that, you know, because of the nature of 503(b)(9), if the payment that was being avoided was a originally a payment made in accordance with 503(b)(9) which otherwise would have been and was for goods

received within the 20 days before the commencement of the case, that if that's avoided, that it doesn't -- you can't, I guess, read out the fact that that's treated in a different way. In other words, it's not just to be treated as if it was an unsecured claim because the code provides for that sort of claim and that in theory, you know, that claim could still be asserted.

I'd be interested in your thoughts on that. I think that gets into the third argument you were getting to probably more --

MR. MILIN: Yeah.

THE COURT: -- than anything else for item three, but that's where I think that -- again, I readily -- I am of the view that Congress didn't think this through very well on how these statutes were -- no disrespect to Congress -- about how these statutes were supposed to harmonize because they were just changing something to deal with reclamation issues and doing 503(b)(9) and I don't think they thought through, how does this harmonize with other provisions of the code very clearly. And that's not meant disrespectfully to anyone's argument here today, because none of us, you know, we're stuck with what the statute says.

But I think that, you know, the issue is that there's -- you're right that it wouldn't create an administrative priority claim for -- that arose, you know,

that related to post-petition -- like a post-petition administrative priority claim for sure, but it just says as if it arose prior to the petition date. That doesn't mean that it couldn't -- if Congress did something unusual like, which it did here, in creating an administrative priority claim where the facts that gave rise to that and the transactions that gave rise to it were all prepetition, I don't know that the code is very clear on this point.

Again, I don't think that's the way I normally think of 502(h). It's not the way I, my entire career in practice was really dealing with 502(h). And that's not how 502(h) is traditionally applied, but I'm not sure it's prohibited from the language.

MR. MILIN: Understood, Your Honor, and I will move on in a second to present our position on that issue which I hope will help Your Honor's decision-making process. But I think that there is some important validity to the -- one of the two arguments I just meant -- made briefly because, look, 502(h) says that the claims it creates have to be treated as if they arose before the filing of the petition.

So whatever Judge Drain may have ruled about 503(b)(9) and whatever this Court holds with respect to 503(b)(9) generally, we're saying if a 503(b)(9) claim is created under 502(h), 502(h) makes it a prepetition claim

that can be set off against post-petition preference liability. So I may just -- saying the same thing over, but I really think that that's a very powerful and important point.

But -- so let me try to address Your Honor's broader concern. We've talked about now 18 issues. There's only this one issue for denying a set off left to discuss, and that's the hard issue whether 502(h) can create administrative priority claims under 503(b)(9) which is an issue of nationwide first impression. If the Court resolves any issues -- I'm sorry.

THE COURT: No. Go right ahead.

MR. MILIN: Okay. So if the Court resolves any of the seven issues just discussed on plaintiff's favor deciding this issue may be unnecessary at least for now. Also we think the issue is pretty thoroughly discussed in our brief, but I'd like to summarize it for you.

Defendant's motion asked the Court to rule that creditors can never be held liable for preferences no matter how much they pressure struggling companies to pay them for goods delivered within 20 days of bankruptcy. Defendant admits that pretty clearly at reply Page 28, and that unprecedented ruling, it would be contrary to the statutory language, congressional intent, and undermine the most basic purposes of the Bankruptcy Code.

So in our papers we make four key points. First, defendant's two cases, Bank (indiscernible) and Hackney and I know they've now added Falcon, don't concern 503(b)(9) and they don't concern preserving the priority of a creditor's claim if the priority depends on timing. Bank (indiscernible) concerned a fully secured claim. Hackney concerned a non-dischargeability claim. I forget, I guess which of the priorities Falcon concerned. Mr. Garfinkle informed us of that.

But none of those are about timing. They're about the inherent status of the claims and the issues come out differently as to statutory language, policy, and congressional intent. They all change when timing determines priorities. The statutory of language of 502(h) as Your Honor knows, doesn't mention the claim status, but it does specifically address timing. It says that a claim that will be allowed as if it had arisen before the petition date, not as if it had arisen on the date on which it originally rose because 502(h) specifically addresses timing and doesn't preserve the timing of the original claim, even though Congress could have said so.

The plain language of the statute must be interpreted to mean that it doesn't preserve the priority of claims if that priority depends on timing. Defendant's reading of the statute would assert insert additional

language that isn't there, contrary to the very plain language approach defendant asks the Court to take with respect to paid new value.

Third, the legislative history of 503(b)(9) indicates that it was intended to provide an alternative remedy for recognition or reclamation claims, not to eliminate preference liability whenever goods are delivered within 20 days of bankruptcy. Nothing defendant says establishes the contrary, including its mention of an inapplicable Latin fallacy followed by what's clearly a non sequitur. That's at Page 28. There is simply no evidence. There's a lot of debate about what Congress intended in 503(b)(9).

We cite a couple of cases which explained that. One of them cites an article which addresses it. I won't say definitively what the purpose was, but there's certainly no evidence that it wanted to eliminate all preference liability whenever goods were delivered within 20 days of bankruptcy, and I may be preempting something that I was planning to say in a bit, but one way to see that is that the liability would be eliminated only for deliveries of goods, not for delivery of services, because services can't be reclaimed and therefore aren't relevant to the problem that 503(b)(9) was clearly intending to solve.

So interpreting 502(h) to create a 503(b)(9)

claim, it doesn't serve Congress's purposes. It would directly conflict with the preference statue, and in contrast, interpreting it to preserve claims security or other special status in the cases that defendant relies on is fully consistent with Congress's purposes. So the purpose is different. The statute's different. The effect is different.

And given the conflict between -- the defendant's argument would create between 502(h) and 547, as Your Honor mentioned earlier, the Court should try to harmonize those statutes and it can do that simply by rejecting defendant's interpretation of 502(h). So finally, interpreting 502 --

THE COURT: Mr. Milin?

MR. MILIN: Yes.

THE COURT: Do you mind for a second? I think actually the interesting thing about this case, in addition to this obviously being a case of first impression, is that in most circumstances where the 503(b)(9) claims, if you did discount your argument and you applied a 503(b)(9) claim and determined that that's what arises under 502(h) because it's still a prepetition claim, if somebody did that, that normally wouldn't matter because it'd be paid a hundred cents.

So it's literally like the party who had the preference claim, have to pay the money to Debtor and then

the Debtor would have to pay the money to the party at a hundred cents. The issue here is that under the theory that you're operating or that I'm operating, hypothetically, the party would have to pay the preference liability and then the party would only get paid 20 cents even if it was a 503(b)(9) claim that it got, because of your distribution.

So that's probably why the setoff issue is such an issue because it's not the same result. You really get the same result in most cases, even if you applied it because you wouldn't -- as a setoff would because you'd just be running money around the table at hundred-cents dollars and that's not what we have here.

MR. MILIN: Right.

THE COURT: Even if you did go as far as applying that in the statute, just factually.

MR. MILIN: That's one of the reasons why what defendant's asking the Court to do is so dangerous. The only reason why defendant doesn't get completely off the hook for changing the Debtor's payment terms from the contract unilaterally ten days before bankruptcy and threatening it repeatedly that if it didn't pay, it would discontinue the next day, knowing that that would disrupt the Debtor's ability to ship; the only reason why that conduct may not be fully insulated is because of the fact that this is an administratively insolvent case.

If Your Honor rules the way they want you to rule that 502(h) does create an administrative claim, it would insulate all kinds of bad conduct for the 20 days before bankruptcy. They're expressly trying to do that and it's a disaster as a policy matter. It's not consistent with what the statute says. It's clearly not what Congress intended. And as I was about to say, it would be inequitable and contrary to other goals.

It's inequitable because it only eliminates preference liability for sellers of goods and not sellers of services. So, you know, the seller of the goods can pressure the heck out of its customer, but the shipper can't. That's not what Congress intended. It's not equitable. It's contrary to the goals of equity in the Bankruptcy Code.

But worse, perhaps, it would give sellers of goods an incentive to exert extreme pressure on struggling companies because so long as those companies filed bankruptcy soon, the payments this seller extracts will be immune. So, you know, defendant argues that it doesn't need to rely on -- anyway. That's the policy issue.

I was just going to address also the notion that defendant doesn't need to rely on 502(h) because it's already asserted claim, but obviously that doesn't work. Asserting a claim doesn't give you a claim you can set off.

They've been paid in full for these, for the goods at issue on the preference setoff. So it's only if they get an actual claim that a setoff is possible and the only way to get an actual claim is 502(h).

They argue that it's unjust to allow defendant Debtors to reduce the status of the 503(b)(9) claim just by avoiding it. Well, that may be true for a secured claim or for a spousal support claim or a claim like that, but those claims are different. They don't depend on timing and the behavior of the creditor isn't going to make a big difference to the status of the claim. But here, allowing creditors to lose any potential 503(b)(9) priority if they pressure their struggling customers, would give them a valuable incentive not to do that. It would therefore serve a core purpose of the Bankruptcy Code by helping struggling companies to survive.

After all, as I said, defendant itself moved A&P from 40-day terms to one-day terms and threatened to discontinue shipments if A&P was only one day late. That's precisely the conduct that preference law attempts to discourage and there would be nothing unjust in stripping creditors of 503(b)(9) priority for conduct like that. You know, more generally, their arguments that 20-day payments for 20 days deliveries should be immunized in order to encourage sellers to do business with struggling companies

is mistaken.

Encouraging creditors to deal with struggling companies by promising full payment and sound policy. Bankruptcy Code does that a couple places. That's good policy but immunizing creditors even if they pressure their customers into bankruptcy, is not.

Those are, I think the main points I had on this issue. I hope they addressed Your Honor's concerns, but I'm happy to try to address further questions if Your Honor has them.

THE COURT: I don't. I think you addressed my questions. Okay. Thank you, Mr. Milin. I guess Mr. Garfinkle --

MR. MILIN: (indiscernible).

THE COURT: -- assume you want to have rebuttal.

MR. GARFINKLE: I do, Your Honor.

THE COURT: That's fine.

MR. GARFINKLE: Let me start by -- I don't want to get into the gutter here in terms of these, what I think are spurious allegations of inequitable conduct and the like. What I would say, to be thinking about where the inequitable conduct was in terms of the way 503(b)(9), the statute was enacted and its predecessor and underlying reclamation of 2702. And if you look at cases from the 1960s, there's the Federated case out of the Sixth Circuit, there's the Mel

Gordon case followed in 2008 by the Phar-Mor case. They're all based upon the notion that when a Debtor buys bankruptcy -- buys goods on the eve of bankruptcy, they're committing fraud. A&P did not wake up on July 17th, Sunday -- I think was July 17th or July 19th, sorry. July 19th, Sunday, and file bankruptcy for its 180 stores, its 180 pharmacies, file 18 cases.

Weil Gotshal did not file that without lots of pre-planning. So as they're pre-planning their bankruptcy filing, they're still buying goods on credit from McKesson and a whole bunch of other vendors. That is the fraud that is taking place here. It is the fraud which 503(b)(9) is meant to remedy by giving the sellers of goods on the eve of bankruptcy an administrative -- an automatic administrative claim for the value of the goods delivered.

And if you look at the case law, that's what it speaks to. Now, Mr. Milin indicated that there's some sort of legislative history here. We cite on Page 27 and I'll read exactly the language another Court ruled, the Skylar Exploration case. "There is no Congressional history explaining 503(b)(9) or its terminology when it was enacted as part of BAPCPA. As such, any reference to Congressional intent is dubious at best." All we're left with is a statute which automatically awards sellers of goods on the eve of bankruptcy, within 20 days, an automatic

administrative claim.

And the issue before the Court, as the Court has framed it, is okay, if you're going to get -- seek preference recovery for payments on account of those goods, what is the priority status afforded to those goods and is it a wash? My opposing counsel has spent a good deal of time in their briefs and in their argument today talking about New York law.

New York law, let me be clear about this, does not apply. We have a statute under Bankruptcy Code at 503(b)(9). That gives a claim. We have potential preference liability under 547 and 550 for McKesson, which may give the Debtor a corresponding claim. Those are two bankruptcy statutes. This is a federal law issue.

What my opposing counsel did not mention was, and I said this at the beginning of the argument and in our briefing, there is an unbroken chain of Supreme Court cases on setoff in bankruptcy from 1841 all the way into 1913. The Gratiot case, the Page v. Rogers case, and finally the Studley v. Boylston National Bank case. All of them hold that in this situation where A owes B and B owes A, there's a setoff that arises and there's no equitable defenses to it any Court has ever recognized in a bankruptcy context.

Now, that line of cases finds its way into the Bankruptcy Code and the preference lawsuits that then rose

and we cite to the Court, both in our opening briefing -- it shouldn't have come as any surprise to anybody. Plaintiff didn't respond to it in their opposition brief -- the Falcon cases. One was by Judge Schermer, the bankruptcy judge, and affirmed by the District Court.

And I commend to the Court the language of the District Court in the Falcon case. And Falcon was a 507(a)4(a) wage priority claim or benefits claim asserted by Blue Cross Blue Shield. Now, that's a priority, not under 502(h) but under a different section of the code. And the Falcon court said in very clear language that it's a wash and the bankruptcy court properly granted summary judgment in favor of Blue Cross Blue Shield in this circumstance because this is a pointless exercise of trying to recover preferences when the creditor gets to do a dollar-for-dollar setoff, and that's the main point on -- that we've tried to make clear here and put at issue.

Now, I want to go back to our original summary judgment motion. I think the Court has at least a basis to rule today that the first 23 payments that are the subject of the preference lawsuit, by plaintiff's own admission, excepting aside from the paid new value argument, which has been widely rejected over the years (indiscernible) summary judgment on those. Let's narrow this down and I know the Court's going to take this under advisement as to the other

issues, but as to the 23 if the Court's going to rule in our favor, so be it.

I want to address one point that the Court made and I'm sorry to correct the Court because the Court was slightly in error on a legal point, and I'll explain what it is. The Court said that breach of contract claims could be asserted, referencing New York law of six years. That's incorrect, Your Honor, and this was a point that was (sound drops) Judge Drain early in the case and I'll give the Court the reference to it.

This is the sale of goods. It's governed by Article 2 of the Uniform Commercial Code, Section 2-725(1) of the Uniform Commercial Code has a four-year statute of limitations for any breach of contract claim related to the sale of goods. We are now past, well past the four-year statute of limitations periods and Judge Drain ruled exactly that at a hearing held on December 20th, 2021. Probably the Court has not looked at it, but I'm going to give the Court the cite. It's Docket Entry 106. It's the transcript from the December 20th, 2021 hearing on McKesson's motion to dismiss the amended complaint.

And during that hearing, plaintiff made the same exact arguments it's making today. We have all these breach of contract claims for McKesson's supposed bad acts and we want to assert them and the judge said, no they are -- I'm

sorry that was not -- there's also there's a prior hearing. My apologies. It's the hearing on -- it was the motion to amend. My apologies. I think it's the motion to amend. I'm just looking at my notes here. There's another transcript on December 20th, 2021. They did a motion to amend and tried to assert all these breach of contract claims. Judge Drain said statute of limitations of 2-725 bars these claims. You can't bring them. You can't bring them either directly as a breach of contract claim or as a turnover action.

That issue was litigated and decided. Again, I'm playing whack a mole here because now I'm getting it by an assertion or McKesson is getting it by way of an assertion of an unfiled, basically a quasi-claim objection. And the Court noted six years ago the Debtor filed three claim objections, when I was dealing with the Weil firm and I said, guys, do you know what you're doing. Okay, two of them, as we say, are moot. One where they were joint and several liability of the administrative claims. This is the first and fifth claim objections filed by the Debtor then represented by the Weil Gotshal firm.

By virtue of the winddown order, all the Debtor's, other cases have been dismissed leaving one case, the main case, the A&P case, which is called Wind Down Company. That is the only case. So the first two claim objections are

moot. The third claim objection was an insufficient documentation objection. Nothing more, nothing less. Now, I've over the years wondered whether an insufficient documentation claim is a legitimate claim objection under 502. 502 sets forth the basis for disallowance of claims and it says, under 502(b), only way -- 502(b)(1). "Such claim is unenforceable against the Debtor under any agreement or applicable law."

They didn't file an objection like that. They &02:54:11 filed it, that somehow we breached the contract and therefore you shouldn't get a claim. Had they brought that claim, and if they do bring that claim, we're going to be making the same arguments that we made in front of Judge Drain last fall, that these claims are barred by the statue of limitations of 2-725. But the Court need not address that, because all the Court has in front of it is an insufficient documentation claim objection.

And we have provided the documents, the invoices showing delivery. Now, there's conjecture on the part of my opposing counsel, what does DNS mean? Do not ship? How about do not -- did not supply. The invoices speak for themselves. They show the drug codes. They show the drug names, the quantity, and the price. They show where the product was shipped to, all of these, and there are 355 of them during the month of July of 2015, are attached to Ms.

Towsley's declaration.

We also submit the declaration of the Debtor's director of pharmacy operations and she testified that she never was aware of an invoice that McKesson generated for which a product wasn't shipped. And we cite the language that plaintiff's counsel cites in the extension agreement, which he says, that's about McKesson's claim. I think a correct reading and the actual only reading is that the parties were in agreement. Again, this is Paragraph 3 of the extension agreement. As of the effective date, A&P shall pay to McKesson an extension fee of $1 million dollars on account of McKesson's 503(b)(9) claim, which aggregates approximately $2,786,000.

This is both sides agreeing to that amount. Now, what we've heard today from plaintiff's counsel is well, Judge, they're in breach of this extension agreement. When they think that the extension agreement benefits them, they'll point to it. On the other hand, they'll ignore other provisions of the extension agreement, in particular, Paragraph 4 of the extension agreement. And I'm going to read that for the record because it's critical here in the Court's analysis of these motions for summary judgment.

Paragraph 4. "Prepetition rebates and credits." That's the heading. "A&P acknowledges and agrees that it does not have right to receive capital Rebates, refunds, or

other amounts which accrued prior to the petition date and such amounts may not be used to reduce any of McKesson's claims in the bankruptcy case, including its 503(b)(9) claim." That was the deal McKesson and the Debtor agreed to and lived by and abided by during the course of the bankruptcy case, only now to have the Committee come back and said, well we don't really want to look at that. We think we should get credit for these rebates which the Debtor agreed they weren't entitled to.

No, Your Honor. That is wrong. The parties reached agreement. That agreement is enforceable. It was complied with and abided by during the course of the bankruptcy case and any claims of breach of contract relating to that agreement are now time barred. So for all these reasons, Your Honor, McKesson is entitled to summary judgment on both motions. And again, I go back to the math.

Plaintiff is saying there's $10.6 million dollars or potentially $11.6 million dollars of liability. That puts us into only the 23rd payment of $3.5 million. And again, that payment was on account of goods delivered within 20 days of bankruptcy. Following -- and by the way, plaintiff doesn't cite any cases that have refused to allow this circular setoff kind of concept in preferences. None.

We've cited five or six of them, Judge, all in different contexts. One was non-dischargeability. One was

a secured creditor status. One was a 507(a)(4) priority. We're just now -- the only nuance of this case versus the other cases that all similarly held, is this is an administrative claim. Under 503(b), McKesson has asserted a proof of claim for goods delivered. We quoted the proofs of claim language and it uses the language very deliberately, at least in an amount.

So if McKesson by happenstance of the outcome of this preference litigation has to give back money, its 503(b)(9) claim amount correspondingly increases. McKesson does not need to rely upon 502(h). It already has existing claims in this case which are prima facia valid and that's the point we're trying to get at, Your Honor, and that's the point that the Falcon case and the other cases similarly hold, but this is just wasteful litigation because at the end of the day the creditor gets what it gets and Judge Drain ruled it's a dollar-for-dollar setoff of liability against the 503 claim.

Now, the fixed amount, we think is beyond dispute. Again, quoting the language and applying the language in Section 4 of the extension agreement, such amounts, meaning the rebates, refunds, or other amounts cannot be used to reduce the 503(b)(9) claim. Yet, that is the entire gravamen of plaintiff's position. We've got all these other claims out there, Your Honor, and we get to reduce the claim

of 503(b)(9) even though the Debtor agreed otherwise

That wasn't the deal that we reached and abided by. I'm happy to address any other questions the Court has, or comments.

THE COURT: Yeah, I have a few. Okay. So let's just stick with the fixed 503(b)(9) claim for the moment and the arguments that are being made with respect to that. Okay, I get the argument that there's no rebates post-petition so you're just basically saying there can't be inflated invoice amounts because you won't have rebates and that's what they're really arguing about. Unproven deliveries, you've talked about that. Everybody has talked about that.

What about the returns after they closed the pharmacy? I don't think the agreement says you can't -- if there's a return. Did that actually occur?

MR. GARFINKLE: Your Honor, we have never really -- this is a $44,000 issue. We have not really delved into that issue, I -- you know, in any great detail. What I told the Court when this came up saying McKesson abides by its agreements. Now, I haven't looked at whether they're entitled to a $44,000 reduction and I will pledge to the Court that we will look into that and if they're entitled to it contractually, we'd abide by that, that $44,000 reduction. It's -- given the dollars at stake in a 20

percent case, you're only talking about $8,800. I'll spend more money fighting that or trying to research that than probably worth in a 20 percent --

THE COURT: I understand.

MR. GARFINKLE: -- 20 percent administrative case. But you know, I can look into it and try to figure it out. It wasn't something we spent a good deal of time trying to figure it out.

THE COURT: Okay.

MR. GARFINKLE: I do have one -- I know the Court, we haven't talked about the motion to strike. I do have one, just a quick follow on the motion to strike when the Court deems it appropriate.

THE COURT: Okay, that's fine. I just want to keep my questions here because we're going to get to a point where probably I'm best at betting in half an hour at most, my clerk's going to tell me or my courtroom deputy that we're going to have to take a break because we're going to otherwise lose recording and we'll have to dial back in. That's just how this works, but --

MR. GARFINKLE: I'll try to be quick, Your Honor.

THE COURT: No, no. I don't think that's possible with a motion to strike. But anyway, let's keep going. So --

MR. GARFINKLE: I -- sorry.

THE COURT: No. Can I keep going, my questions?

MR. GARFINKLE: Yes, Your Honor.

THE COURT: Okay. So the question that I had is obviously there's a lot of issues that have been raised apparently in connection with, I guess I'll just say that you're saying are basically, Judge Drain's already ruled are barred time-wise and they're arguing is included in their complaint. How do I square that?

MR. GARFINKLE: Your Honor, the complaint speaks for itself. Judge Drain was very clear as to what claims could be brought and they're in the complaint and we're not seeking summary judgment on those. They are two alleged breaches of the automatic stay. One involves what are called met -- what the plaintiff calls medturns. These are goods that were returned for which McKesson did not give the Debtor those funds or allow them to be used for post-petition purchases. That's number one.

The second item is this November of 2015 rebate issue of approximately $240,000. That was the whole scope of what Judge Drain permitted to be asserted as a violation of the automatic stay or correspondingly a deduct against McKesson's 503(b)(9) claim. We are not asking today for the Court to make a ruling on those two issues at all. Anything beyond those two discrete automatic state violations are beyond the scope of the lawsuit that's pending and to which

Judge Drain ruled could not be asserted by way of a breach of contract or a turnover action.

THE COURT: Okay.

MR. GARFINKLE: So that --

THE COURT: What about, though, the argument about the inequities in the set off argument? I guess, is that something that he also precluded that from being utilized in connection with? I'm --

MR. GARFINKLE: We believe --

THE COURT: -- clearly going to have to go read like 25 transcripts now after this hearing, but that's okay.

MR. GARFINKLE: Yes, Your Honor. We do believe that those are precluded by virtue of Judge Drain's rulings. He was quite clear that this fishing expedition of equitable throwing away, things are just -- the point I'm making here, Your Honor, is we looked. We can't find any case in a bankruptcy context where this kind of netting or setoff was denied for equitable reasons.

In fact, we can't find any federal cases that support this theory of plaintiff in that regard. It just doesn't exist in this context, and --

THE COURT: Yeah, I mean, you may be right. It's not something I've seen a lot of either in my practice, so when I was -- before I was on the bench, so it's certainly not something that is common; I'll grant you that. I have

seen it once before. It wasn't in the context of a federal setoff. It wasn't in the context of a state law setoff. I -- so that's obviously something I'll have to look at. I agree with you that Section 553 itself doesn't reference anything about equities.

MR. GARFINKLE: I don't even know that 553 truly applies here in that this is -- you're dealing with post-petition claims and post-petition liability, so 553 --

THE COURT: Yeah, well, no. I think there is case law that actually -- that's where I disagree with you, Mr. Garfinkle. I think there is case law that that does apply it in the context of post-petition versus post-petition. It does exist.

MR. GARFINKLE: Okay --

THE COURT: It probably was not in this context, I will say, that that's for sure, but it -- that exists. So --

MR. GARFINKLE: And I'm --

THE COURT: I don't think that --

MR. GARFINKLE: Sorry.

THE COURT: Yeah, I don't think that's it. It's the point about the equitable issue I was really raising because I again, I have not seen that in the context of somebody seeking to utilize federal law, whether it's the 553 or some kind of federal common law argument. I haven't

seen that, but that doesn't mean it doesn't exist. It's just I have not seen it.

MR. GARFINKLE: And again, I go back to --

THE COURT: That's definitely --

MR. GARFINKLE: Sorry. Talking over each other.

THE COURT: No, go ahead.

MR. GARFINKLE: I go back to the line of Supreme Court cases that I've cited throughout the hearing. So that's all I would say.

THE COURT: Yes. No, I hear you. I understand. All right. Just give me a second here and see what else I might have to ask you about. I think the reason I'm -- by the way, the reason I'm asking you about these questions is you really are asking me to find with respect to your claims objection. And so that's why some of this stuff would be relevant because they're asserting its defense to your claim, whether they've actually raised that or not in the context of the objection is a different issue. But that's what they're arguing.

Okay. Question for you. So, if I understand your argument, you are arguing that because there was a bar date and you filed a claim before the bar date -- and I'm saying an administrative claims bar date, by the way, just to be clear -- for any 503(b)(9) claims that could arise out of the -- as a result of additional claims as a result of the

preference process or otherwise for 503(b)(9), basically you're saying because you filed a claim in that process that even though there's going to be a 547 preference process, there is not a 502(h) claim that arises.

MR. GARFINKLE: Well, I think you could have a 502 -- you know, the way we, McKesson -- I will speak to McKesson specifically. We draft our proofs of claim and I think the way we do it, did in this case, is to the extent a 503(b)(9) claim is disallowed, that McKesson asserts a general unsecured claim under 502. So in this circumstance, it's kind of a double kind of -- you don't need 502(h) to get to where the Court -- where we think you need to go because we've already filed the claim.

But even if we hadn't filed the claim or the Court says that claim is insufficient, 502(h) would give McKesson a claim and it enjoys whatever priority status that claim would have under the Bankruptcy Code, be it secure -- if it was secured or 507(a)(4) as in the case of, the Falcon Products case or in McKesson's case a 503(b)(9) claim. It has --

THE COURT: Yeah.

MR. GARFINKLE: -- all the attributes of the claim. It doesn't -- and this is what the case law holds in that regard and there's nothing untoward about that.

THE COURT: Well, there's obviously a few cases

that have looked at this in other contexts and I get that and I understand why somebody might reach that conclusion.

It's interesting because I completely understand why you filed a proof of claim or would have filed a proof of claim under the circumstances for the administrative bar date to make sure that there was a claim, but I'm not sure that if there's actually a preference action that occurs and someone's successful in an avoidance calculation, again, that obviously makes a lot of assumptions here that we've been talking about hypothetically, then that doesn't, you know, always give rise to a 502(h) claim just by virtue of it.

And then the only issue is what does the 502(h) claim mean. Does it mean that it's the same priority as it would have been prepetition, which in this case would be a 502(b)(9) and in the cases you cited to would have been either priority claims under 507(a)(4) or a secured claim, but also as of the rising of the petition and I guess the question I don't think you've addressed which is really a public policy argument that Mr. Milin was making, although it, I think you know, made it in a way that certainly calls into question some things, is do you really think that Congress intended people to get -- who have the benefit of 503(b)(9) to get the benefit of immunity?

That's really what he's arguing about because I

think that's actually the most troubling thing about trying to harmonize these statutes, in part, because I don't really think Congress intended that nobody could ever get sued for a preference relating to 503(b)(9). I just, I don't think they thought about it and maybe if they had that would have been the answer, but I just don't think there's anything in the legislative history that indicates that they ever thought about in any way, shape or form.

And I guess you're going to say to me it's a similar thing for someone getting a preference who would had to have had a priority claim or a secured claim. You know, are you trying to -- you know, you're trying to just put someone back in the position that they would have been, even if it's an unsecured claim that they're getting, meaning unsecured otherwise or a prepetition claim.

My courtroom deputy is telling me, how long? Five minutes. Okay. Five minutes we're going to have to take a break. That's what she's telling me.

MR. GARFINKLE: Okay.

THE COURT: Because we have to stop Court recording and re-record.

MR. GARFINKLE: Yes.

THE COURT: Anyway, so I just -- I'd be interested in the immunity argument because I do -- I find if I read the statutes in the way that I think might make sense to

harmonize this, there are some odd things about this case. One is that obviously you end up with an administrative claim under 503(b)(9) but -- possibly. And in this case, you don't get paid 100 cents, but in other cases somebody might. And so in this case, you're not really getting the type of windfall that I think the policy argument for immunity is saying because you obviously provided goods and you're only going to recover 20 cents.

So that is, pardon me for saying this, that is obviously in some ways punishing somebody for, you know, or providing them with something that isn't 100 cents in the context of a preference. But if this was an administratively solvent case, you would in essence under that argument be getting 100 cents and you would in essence be immune from suit. Not -- you would have been sued. Money would've been running around the table like I said before, it would have been 100 cent recovery back.

So I would be interested in your thoughts on that and then I'm going to have to say we're probably going to have to take a break.

MR. GARFINKLE: Yeah. Let me quickly, hopefully before time runs out. I don't think it immunizes, nor does it harm. Preference law is not meant to punish. It's meant to restore parties' position where they were had they not gotten unusual payments. So in this situation, the estate

has benefited. It got the goods. Congress has said those goods entitle to administrative priority. It's not immunizing. Congress has already said these parties are entitled to higher priority treatment. And so the creditors generally aren't penalized here by virtue of requiring that those goods be paid for either by way of a 503(b)(9) increased claim or just don't pursue the preference.

This is why Trustees never -- in fact, I can't find a report or any kind of decision where a Trustee has ever in this country sued for a 503(b)(9) payment and argued it's preference because it's a foolish argument. It's a circle. And that's the point --

THE COURT: You know --

MR. GARFINKLE: -- public policy standpoint.

THE COURT: And yes, and the reason for that is probably the practical aspect I just said to you, which is that in most cases it's foolish because it's hundred-cent dollar. They going to sue and spend money. They're going to get a judgment. And then the party's going to -- the argument would be if you're trying to harmonize these statutes in the way we're discussing it hypothetically, that then the party is going to get -- have to get paid 100 cents on the new claim that arises under this and that would certainly deter people from doing it.

But if it's 20 cents on the dollar then maybe it's

a different situation. You know, it's not 100 cents. I get that may be why no one ever did it, because it wasn't an administrative insolvent case and they were going to have to pay 100 cents, and why would they litigate just to get 100 cents back? That wouldn't make sense.

MR. GARFINKLE: Plus, you have all these other administrative creditors who similarly may have gotten payments for other goods that maybe weren't sued for this. I don't know, Your Honor. So why should those people get the windfall at the expense of McKesson?

THE COURT: Yeah.

MR. GARFINKLE: We're dealing --

THE COURT: I understand what you're saying. Okay, I think we're going to have to take a break.

MR. GARFINKLE: Okay.

THE COURT: My suggestion would be 15 minutes unless people have a different perspective.

MR. GARFINKLE: That's fine, Your Honor. Fine.

THE COURT: Okay. All right, so that would be -- sorry, let me look on my phone. Okay, so it's 1:07 on my phone right now, so how about we'll do 1:25, if that's all right.

MR. GARFINKLE: Can we leave the line -- can we leave the line open, Your Honor, or do we need to call back in?

THE COURT: No, we actually, I think, have to disconnect because recording is

MR. GARFINKLE: Okay.

THE COURT: -- going to stop. Sorry.

MR. GARFINKLE: Okay.

THE COURT: That's what we have to do. Okay, so why don't we dial back in at 1:25 then. Okay?

MR. GARFINKLE: All right.

THE COURT: Thank you.

MR. MILIN: Thank you, Your Honor.

(Recess)

THE COURT: Good afternoon. This is Judge Beckerman. We are reconvening from our adjournment and Court is back in session.

Mr. Garfinkle, I think we had finished our discussion but I wasn't sure before we get onto the next item on the agenda, which is the motion to strike.

MR. GARFINKLE: I think so, Your Honor. Just to wrap up just one comment. I think when you look at this, to repeat, McKesson's liability is maxed out at $10.6 million under -- as the Debtor admitted in its reply. They now take it up to 11.7. I think the Court, at a minimum, should grant summary judgment on everything in excess of that. Anyway, I'll just leave it at that and I know the Court's going to take this under advisement.

On the motion to strike, I just want to point the Court --

MR. MILIN: If I may, before we move on. Your Honor, may I respond to the discussion the Court just had with Mr. Garfinkle about the summary judgment motion?

MR. GARFINKLE: Your Honor --

THE COURT: What do you need to respond to Mr. Milin? Because we -- I don't think we discussed anything that was new.

MR. MILIN: I think, Your Honor, that you did. I have about 13 points. I don't intend to repeat myself and they will go very quickly --

THE COURT: Thirteen points? Now about --

MR. MILIN: I know, I know. I know, I know.

MR. GARFINKLE: Your Honor, there's no way --

THE COURT: -- five minutes.

MR. GARFINKLE: There's not a right of Sur-Reply in oral argument.

THE COURT: I know. I understand.

MR. MILIN: I'll be very quick.

THE COURT: -- possible. Five minutes.

MR. MILIN: You got it. So first, Mr. Garfinkle said that the amount reserved was 260. That's not true. My client wanted to make sure Your Honor knew it was more than that and she says it's adequate in her declaration. With

respect to legislative history, Mr. Garfinkle cited the case that says there isn't any. We cited two cases that say the contrary. Also, the purpose is clear from the effect and there's certainly no indication that the intent was to immunize claims.

Mr. Garfinkle relied on federal cases, but there's no federal setoff law, and although he didn't discuss what underlying setoff law the cases he cited relied on, the Court should please not assume that federal law is going to control here in any straightforward way and we still don't know what its requirements are because he didn't say.

The statute of limitations is not at issue here, but Mr. Garfinkle talked about it at length. He says it's four years under the UCC. We understand that. However, this is a case about successful concealment of taking money back and there are issues of tolling. There are issues of revival under New York state law which says if you sue somebody, it revives all time barred claims and Judge Drain's ruling was on conduct no later than November 15. The conduct issue now is later.

Invoices. Mr. Garfinkle talked about that again. Our only point is he hasn't explained why there isn't proof of delivery, and by this point certainly should. Next point, and the -- Your Honor seemed to be slightly confused about this, so I think it's important. Mr. Garfinkle relies

on Section 4 of the extension agreement. That is only about rebates by its express terms that accrued before the petition date. It's not relevant here in any way. The Section 8 of that agreement, as we discussed in our amended complaint promises credits to be paid separately from the rebate. So there's a big issue there.

What accrual means in the context is a big issue. Our -- my client has testified that rebates didn't accrue until they were paid. It sounds odd, but that's the way they did things. So Section 4 isn't relevant and besides we aren't seeking to reduce subsequent new value by rebates. We are seeking to reduce subsequent new value by the overstatement, which just happens to equal the amount of the rebates.

Just a couple more quick points. Mr. Garfinkle said he'd look into the $44,000 And that it's only $8,000 because of the amount admin claimants are being paid. In fact, if he received a setoff, it'll be full value of $44,000, but what's more, the defendant hasn't explained the $327,000 which may fall in the same bucket. So we would ask that he investigate and explain that as well.

Clarify something that I may have miss -- been unclear about. The amended complaint does not include the items B-1 through B-4. Our point is that the same analysis would let us assert those by way of stay violations, which I

believe are not subject to a time bar and also as setoffs to their claims.

Now the setoff cases, there was some discussion that Mr. Garfinkle said he didn't know any case that actually denied a setoff for equitable grounds. We refer to the Artisan case and other cases we cited at Page 27 of our brief. Certainly, Artisan denied a setoff.

And I am almost done. So this argument about their 503 filed claim, 503(b) filed claim is, we suggest, entirely a red herring. We can move to dismiss it because the goods were paid for. The question is whether we would need to do that in order to deny defendant setoff. I think that would not be useful but their current claim is invalid. They got paid. There is no valid claim for those amounts.

So unless Your Honor has questions, I hope I've been within the five minutes. I've certainly done my best to abide by it.

THE COURT: Okay. Thank you, Mr. Milin. All right. So let's go on to the motion to strike.

MR. MILIN: Okay.

THE COURT: Obviously, this is a very lengthy request to strike lots of things out of this declaration.

MR. GARFINKLE: Yes, Your Honor.

THE COURT: And while I have done that in trial where I've stricken things out, I honestly haven't seen this

in summary judgment myself. So that's the first thing I wanted to ask because I don't think, you know, it's -- the purpose of affidavits in summary judgment are, you know, slightly different usually than they are, as I think I noted before to you, Mr. Garfinkle, as they are in some ways -- than they are in trial.

I mean, this is in trial testimony. It's obviously to provide evidence to me that there is a dispute as to material -- any material fact and that that's the issue. And it can -- it has. I have seen this where it's not just, it's basically to show whether there is -- to demonstrate that there is not -- I guess double negative -- that there is a genuine dispute.

And sometimes if the adverse party can ultimately produce evidence that would be reliable at trial then, I've certainly seen that. It's not required that at this point. You know, I'm really trying to determine if there's a factual dispute. So, and it and it is a judge, not a jury. Another point I will make.

So, I guess I would I would like to discuss the purpose of the motion to strike. If you'd asked me to strike a few modest things in this, I probably would look at this differently than what you're doing because I'm not sure we should be going through every single one of these evidentiary issues right now for purposes -- my purpose,

because this isn't getting -- this isn't her testimony at trial.

MR. GARFINKLE: Your Honor, can I -- you want me to respond --

MR. MILIN: First if we could just clarify. Your Honor, you did receive, I hope, our written response last night.

THE COURT: I did. And I've read --

MR. MILIN: Very good. Okay. Thank you.

MR. GARFINKLE: Your Honor, we debated whether to file this motion to strike. The declaration as you know, of Ms. DeVito is 129 paragraphs long. I would commend the Court a excellent decision out of this district by Judge Gerber from 2008. The cite is --

THE COURT: Okay.

MR. GARFINKLE: -- In re: Perry Koplik Sons, Inc. The cite is 382 B.R. 599 (S.D.N.Y. 2008). And Judge Gerber dealt with almost an exactly similar situation albeit in the context of a trial declaration.

THE COURT: Yeah, well I --

MR. GARFINKLE: So we --

THE COURT: -- I have stricken -- I'm stopping you there, because I have stricken things out of people's trial declarations, particularly because in my chambers rules all direct testimony, just like Judge Drain does and some other

people in our district, is in the form of a declaration. So then that is relevant. So I need to understand why this is necessary now. That's what I'm just trying to understand because this is not trial testimony.

MR. GARFINKLE: But it is evidence that would be akin to what trial, for the purposes of a Rule 56 motion. And I just want to point out what Judge -- in that case, the liquidating Trustee submitted a lengthy trial declaration. He was an accountant, a CPA, just like Ms. DeVito. And what -- and there was a 701 challenge to that declaration and what Judge Gerber said was that the Trustee could testify as to what happened, but he can't testify as to -- I'm going to quote the language exactly because it's important -- "as to her perception of right and wrong, nor could he testify as to what should have been done, cannot testify as to customary business practice or what his training and experience tells him about appropriate conduct."

And unfortunately, the declaration that was submitted runs afoul of all those teachings of Judge Gerber in the Koplik case. And that's why we filed the declaration. I can give you example after example, but claiming that we -- that she knows that we violated the automatic stay or that this was wrongful conduct and it goes on and on, 129 paragraphs. And so in our view, Judge, most of her testimony or good portion of it, needs to be stricken

because it's inappropriate for that kind of declaration.

She can testify as to facts, what happened. But what she can't testify are all these -- I can't even say it --

THE COURT: Disparaging.

MR. GARFINKLE: Wrongful allegations, disparaging allegations or violations of the law or her conclusions. No. That's inappropriate. It's inappropriate for trial and it's inappropriate for Rule 56 motion. And that's our point, Your Honor. Let's just say that I -- let's just say I agree with you. Mr. Milin makes a good point which I think is right.

Actually there's actually two points I would make to this. Number one, I'm -- you know, I have to figure out if there's actually a dispute of fact. That's really the purpose of this. We have a number of issues that are really legal issues, like completely legal issues here in these motions. And then we have some issues that are not just legal issues. And then I have to figure out if there's a dispute of fact between the parties. That's all I have to decide.

I don't have to decide whether, if there's a, you know, whether or not somebody did anything wrong or didn't do anything wrong or alleged wrongdoing. I just have to find out if they're -- parties are disputing a genuine issue

of material fact. I don't think that I need to, you know, I think I can use my own judgment when reading this, especially given the fact that you have now provided me with this lengthy list of all the things that you think are wrong in every single paragraph, when I go back and reread her declaration for purposes of this.

I just don't -- to be honest with you, I don't see how I'm going to be relying on this other than that there's a dispute, that she's saying there's a dispute. I'm not determining whether someone did anything wrong in connection with the summary judgment motion. That's not what's before me, no disrespect for this type of summary judgment motion.

I mean, this is an issue of what did Congress mean, you know, what was -- you know, what is the subsequent new value defense and how does that, you know, the subsequent new value defense, do I look at, you know, paid amount? Okay, that's a legal issue. How do I interpret Section 547(c)(4) of the code? I'm going to have to look at, you know, issues of how do I reconcile 547, 502, in your case, 503(b)(9), and possibly even because you invoked it, you know, like, 503(a).

But you know, I'm not I'm not looking into whether somebody did anything wrong. There's really just a question of the facts that you've alleged and the facts that you've alleged in support of the motion to dismiss, obviously don't

have to do with wrongdoing and that's not what you're asking me to find. You're not asking me to find you didn't do anything wrong. You were just asking me to find things in connection with this motion as to calculation of the subsequent new value defense as to setoff rights.

Now, it's true that they've raised the issue of equities in connection with the setoff right. But I -- if I found that there was a dispute about that or if I found that the law allowed that type of argument, I guess that's the first issue, what's the setoff law to the extent it's relevant. I don't think I'm going to get into whether they'll -- what the equities are or not in connection with this. I mean that's just not how I read your papers and no disrespect to Mr. Millan or Ms. DeVito, no matter what they want to put in their papers, I mean, you're asking me to rule on some very specific things for summary judgment and I don't think that they have to do with that.

I mean there -- look, there are some things where in my opinion it does look like it's possible that people have a genuine dispute on the facts and that may be something I can grant summary judgment for if I find that based on her declaration, but I'm not sure that the facts that are in dispute are because of hearsay issues, I mean, or improper lay opinion, which is probably a good chunk of this or her trying to be an expert which I grant you is an

issue and if that comes in trial that's going to be an issue. Because either the parties have to treat her like an expert and they have to go through the process for expert disclosures and reports -- no disrespect to Mr. Milin -- or they're not.

But I don't think that's what I have before me today. All right, well, I berated you enough. I'll let Mr. Milin tell me anything I've, you know, failed to consider.

MR. MILIN: Your Honor, I think you more or less covered it. I mean, Ms. DeVito states what her view is. The Court doesn't need to agree with it or rely on it. The Court should pay attention to the facts she states and come to its own conclusions. So, you know, I've stated in some detail why I believe Mr. Garfinkle's firm has misunderstood the applicable law, but fundamentally, Your Honor can just make her own decision about what to believe and what not to believe in Ms. DeVito's declaration.

THE COURT: Yeah. And look, Mr. Garfinkle, I don't think this is a wasted exercise for a couple of reasons. And let me just be clear about that for the record. Number one, I will certainly look at your issues that you've raised when I'm reading -- rereading her declaration. But I highly doubt, to be candid, having looked at your -- the issues that you raised in the objection that 90 percent of this is probably not -- at

least, it's probably not something that I would be relying on for my purposes at all, because I don't think those are what you're asking me to decide.

I do think Mr. Milin, and just note this for -- I think I've said it now already, but I'm going to say it again, just so you're aware -- I do think that some of the descriptions in here, and again, this is not the purpose of this affidavit. It's not her trial testimony. But I do think there are some issues with possibly some improper lay opinion, you know, lay testimony and opinion.

And I do think that for sure if somebody is going to want to have her treated as an expert for purposes of that, then as I've already told you, you're going to have to comply with the rules relating to that before me and I'm not going to take the position that she doesn't need to file expert disclosures or expert report or any of that, none of which has happened. So I -- and she'd have to qualify as an expert, but I don't think that's the purpose you put in this declaration.

MR. GARFINKLE: Right.

THE COURT: So I'm not looking at it that way. I'm looking at it as this is -- it's a factual dispute issue because that's what the purpose of summary judgment is, is for me to decide if there's some kind of genuine issue. And it may be that if I went determined that there was a dispute

and then we went to trial and then you offered the same document up, just -- I know that wouldn't be what happened. But I'm just being hypothetical again. That I would have to strike some of this because I do think there are some issues about both, you know, the lay opinion, the expert issue, and some hearsay issues, but that's not where we are now. That's not the purpose here. So --

MR. GARFINKLE: Thank you --

THE COURT: Again, it's just to show a genuine whether there's a dispute. It's not for me to determine that this is true.

MR. GARFINKLE: Right. My only comment, Your Honor, is that the Rule 26 doesn't actually require full disclosure from Ms. DeVito, we think, as we cited in our papers, but that's not an issue for today.

THE COURT: Yeah, understood. Okay. Well, Mr. Garfinkle, I'm going deny your motion to dismiss but I promise you for the record that I am going to look at -- and my clerks will look at every single issue you've raised in connection with each paragraph when we reread her declaration, when we're looking at decision and we'll obviously consider what makes sense or not. And that as I've noted, I think most of the purpose of this affidavit is such that it's not her trial testimony, but it's just to demonstrate that there's actually -- whether or not there

are issues of material fact.

And as I noted, your motions for summary judgment don't require me to determine wrongdoing or any of those things. That's not what your motions are related to. They're completely related to either -- I don't mean this in any way disparaging or critical, but they're either genuine issues of law or they're a combination of fact and law issues that have to do with calculations of claims and not issues of the wrongdoing.

I'm not being asked to find whether anything you did was inequitable or not or your client did here. That's what I mean.

MR. MILIN: Thank you, Your Honor.

MR. GARFINKLE: Thank you, Your Honor.

THE COURT: Okay. All right. Well, thank you very much. I appreciate all the argument and the hard work that went into this and this will be a, I'm sure, a fun project for me and my law clerks to have to wrestle with areas of the law that obviously in some cases no one's raised, I mean no one's actually written an opinion on. So that will be interesting for us. Very challenging and fun.

But that's why I decided to apply for this job. So it's a good -- I don't mean that in a negative way.

MR. MILIN: Your Honor, could you give us any kind of indication as to timing given that there are a lot of

witnesses and experts and folks who are going to want to know? Can we -- I mean, there won't be a trial before X date or whatever guidance Your Honor can provide.

THE COURT: Well, I can give you the guidance that I have a trial on Monday and Tuesday. So I'm clearly -- no disrespect to you all, but I'm clear, this is not going to be something I'm going to be like turning my attention to this -- the rest of this week because I have to prepare for my trial on Monday and Tuesday in addition to other things. But that -- like for example, my mega case that filed two days ago and I had first days yesterday that I squeezed in for two-and-a-half hours and the person that probably stopped to have a epileptic fit because I haven't yet entered their interim DIP order, which is only due to the fact I haven't been able to get off the phone and read the red line. Things like that.

But aside from that, no, I don't think I can give you guidance. We obviously won't have a trial that sneaks up on anybody. I don't do that. I will I say to you that, obviously if -- when we get to that stage, I'm sure we'll have a number of discussions about it and it will have to be planned. I don't even have any sense of how many witnesses we'd be talking about just because you know, obviously I looked at the summary judgment motion.

I haven't had to try to figure out what else we're

going to have. So I would have a sense of what you'd be calling for the issues in this matter, but that, that's not everything, as you all noted.

MR. MILIN: Right.

THE COURT: So I don't think I could --

MR. MILIN: -- no sneaking is really all I'm asking for, so thank you.

THE COURT: Yeah. Yeah, sorry. Just that and I will, if we get to that stage, we'll certainly be discussing, how we're going to be doing that. I've been trying to get people to come in person for trials and evidentiary hearings. I'm batting about maybe 50 percent or less at this point where I have had an in-person trial. This is not my first one. My second. But I -- and I've had -- but everything else, I've had, trials and evidentiary hearings, I have otherwise had to have on Zoom because it's just -- you know, so far, I haven't gotten to the point where I forced anyone to come to Court.

So just because people aren't comfortable. So I've been, every time that happened, I we've gone to Zoom, but some of my colleagues are doing hybrid. So I haven't tried that. That might be possible at some point. And obviously with cases going up again, unfortunately, I'm hoping everything stays good because I wouldn't want us to be -- go back to where we were a couple of months ago where

we couldn't even come into Court.

So stay tuned. All right. Well, that's my answer to your question. Sorry.

MR. MILIN: Thank you.

THE COURT: All right, well, if there's any -- is there anything else that I need to address today with respect to this matter?

MR. MILIN: I don't think so.

MR. GARFINKLE: Not from McKesson, Your Honor.

MR. HAMERSKY: No, Your Honor.

THE COURT: Okay. All right, well thank you all very much and I wish you a good rest of the day.

MR. MILIN: Thank you.

MR. GARFINKLE: Goodbye.

THE COURT: Goodbye.

(Whereupon these proceedings were concluded at 1:54 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

Sonya Ledanski Hyde

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Date: May 23, 2022